

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	1994 OAL Determination No. 1
Request for Regulatory	)	
Determination filed by the	)	[Docket No. 90-021]
"LITTLE HOOVER COMMISSION")	)	
concerning certain Program	)	December 22, 1994
Advisories, a Legal	)	
Advisory, and a Fiscal	)	Determination Pursuant to
Management Advisory issued	)	Government Code Section 11347.5;
by the STATE DEPARTMENT OF	)	Title 1, California Code of
EDUCATION <sup>1</sup>	)	Regulations, Chapter 1, Article 3
_____	)	
	)	

Determination by: JOHN D. SMITH, Director

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Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not five Department of Education "advisory" bulletins are "regulations" and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that parts of certain *Program* Advisories and a *Fiscal* Management Advisory are not "regulations," but that each of these Advisories contains *some* provisions which are "regulations," while the *Legal* Advisory rule prohibiting state reimbursement to local school districts for time pupils spend viewing Channel One commercials is a "regulation."

## THE ISSUE PRESENTED<sup>2</sup>

The Office of Administrative Law ("OAL") has been asked to determine<sup>3</sup> whether or not the five advisories we analyze here are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA") before the Department of Education ("Department") may issue or enforce them. The five advisories include:

(1) **Legal Advisory No. 2-89**, alleged to compel "local school districts to reject 'Channel One' and other similar television news programs containing advertising by threatening to delete the portion of the time spent viewing such programs from the districts' certifications as to days and minutes of instruction . . . " (the "Channel One Advisory");<sup>4</sup>

(2) **Fiscal Management Advisory 89-04** which "purports to limit the discretion of local school districts by requiring the districts to restrict to a maximum of twenty hours the amount of time a student may work each week" (the "Work Permit Advisory");

(3) Two related **Program Advisories: Number 89/9-2**, dated October 12, 1989, and **Number 89/9-5**, dated November 6, 1988, which "expressly purport to formulate standards to interpret the supplementary grants program created by legislation implementing Proposition 98" (the "Supplemental Grants Advisories"); and

(4) **Program Advisory 87/8-2**, dated August 26, 1987, which "provides 'advice' concerning the use of categorical program funding after the 'sunset' of the provisions in the authorizing legislation regarding such use" (the "Categorical Funding Sunset Advisory").<sup>5</sup>

## THE DECISION <sup>6 7 8 9 10</sup> , , , ,

OAL finds that:

- (1) applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the APA;
- (2) the challenged rules and policies are in part "regulations" as Government Code Section 11342, subdivision (b), defines "regulation";
- (3) no exceptions to the APA requirements apply to the items found to be "regulations;"
- (4) the parts of the challenged rules, policies and advisories found to be "regulations" violate Government Code Section 11347.5, subdivision (a).<sup>11</sup>

## REASONS FOR DECISION

### **I. THE APA AND REGULATORY DETERMINATIONS BY OAL**

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish *basic minimum procedural requirements* for the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, *inter alia*, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." (Footnote omitted; emphasis added.)<sup>12</sup>

In 1982, recognizing that state agencies were for various reasons bypassing OAL review as well as other APA requirements, the Legislature enacted Government Code Section 11347.5. Section 11347.5 generally prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also authorizes OAL to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code Section 11342.

## **II. THE RULEMAKING AGENCY NAMED IN THIS PROCEEDING; BACKGROUND OF THIS REQUEST FOR DETERMINATION**

### **The Rulemaking Agency named in this Proceeding**

#### **The Department of Education**

Recently, in *State Board of Education v. Honig* (1993),<sup>13</sup> the California Court of Appeal summarized the role of the Department of Education ("Department") and its complex and sometimes delicate relationships with the Superintendent of Public Instruction ("Superintendent" or "SPI") and the State Board of Education ("Board"):

"Article IX, section 1 of the California Constitution sets forth broad legislative policy on education: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.' Section 5 states the Legislature shall provide for a system of common and free schools. The Constitution also outlines the manner by which the Legislature shall apportion funds to operate public schools. (Cal. Const., art. IX, §6.)

"The Legislature in turn delegated certain powers to the Board and Superintendent. Pursuant to Section 33030 [all unspecified references are to the Education Code], '[t]he board shall determine all questions of policy within its powers.' The Board is authorized to 'adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees,' and the government of the various schools which receive state funds. (§ 33031.)

"The Legislature delegated to the Superintendent the power to 'execute, under direction of the State Board of Education, the policies which have been decided upon by the board and shall direct, under general rules and regulations adopted by the State Board of Education, the work of all appointees and employees of the board.' (§ 33111.)

" . . . [S]ection 33301 describes how the appointed Board and elected Superintendent should divide responsibilities for the

administration of the Department: 'The Department of Education shall be administered through: [¶] (a) The State Board of Education which shall be the governing and policy determining body of the department; [¶] (b) The Director of Education [Superintendent] in whom all executive and administrative functions of the department are vested and who is the executive officer of the State Board of Education.'"<sup>14</sup>

Thus, the State *Board* of Education is the governing and policy determining body of the *Department* of Education.<sup>15</sup> The duties of the Department include administering, overseeing, and coordinating various educational programs in the state and local government.<sup>16</sup> The Superintendent of Public Instruction acts as executive officer of the Board and head of the Department.<sup>17</sup>

We will review the substantive law as it applies to each of the separate areas discussed in turn.

### The Department's Rulemaking Authority <sup>18</sup>

As the *Honig* Court noted above, the Board has broad rulemaking powers.<sup>19</sup> Not only must the Department carry out the Board's policies as embodied in the Board's rules and regulations, but the Department itself (through the Superintendent of Public Instruction or "SPI") also has rulemaking authority to execute its particular responsibilities, programs and functions. For example, Education Code Section 33113 mandates the Superintendent to "prescribe regulations under which contracts, agreements, or arrangements may be made with agencies of the federal government for funds, services, commodities, or equipment to be made available to the schools . . . ." <sup>20</sup> The Legislature also has created express exemptions from the rulemaking provisions of the Administrative Procedure Act (APA). For example, Section 33127 mandates the SPI, among others, to develop standards and criteria for local budgets for the Board to review and adopt. Section 33131 expressly exempts these standards and criteria from "Sections 11340 to 11356, inclusive, of the Government Code" (that is, the rulemaking portion of the APA), but requires them to be "codified and published in Title 5 of the California Code of Regulations." <sup>21</sup>

Section 33308 requires the Department of Education to "administer and enforce all laws now or hereafter imposing any duty, power or function upon any of the bodies, offices, officers, deputies or employees transferred to the Department of Education under the provisions of Section 33306." Section 33306, recodified in 1976, provides that the Department "is the successor to, and is vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the State

## **This Request for Determination**

### **Background**

In February 1990, the Milton Marks Commission on Governmental Organization and Economy, more commonly known as the "Little Hoover Commission," submitted a report on California public elementary and secondary education to the Governor and the Legislature. Among other things, this report criticized the Department of Education for use of underground regulations. One of the actions recommended by the report was that the Attorney General file a lawsuit against the Department on behalf of the Commission "to prevent further violations of the Administrative Procedure Act . . . by the Superintendent and to require the Superintendent to adopt regulations only after public hearing followed by review by the Office of Administrative Law."<sup>23</sup> The Attorney General declined to represent the Commission in such a lawsuit.

In May 1990, through its privately retained attorney Howard Dickstein, the Little Hoover Commission ("Requester") filed a request for determination with OAL. This request asked OAL to determine whether the attached "Program Advisories," "Fiscal Advisories," and "Legal Advisories"

"issued by the State Department of Education constitute 'regulations' within the meaning of Government Code Section 11342, subdivision (b), and [whether they] therefore were required to be adopted in compliance with the Administrative Procedure Act."<sup>24</sup>

In its request for determination, the Little Hoover Commission identified the following documents:

(1) Legal Advisory No. 2-89, alleged to compel "local school districts to reject 'Channel One' and other similar television news programs containing advertising by threatening to delete the portion of the time spent viewing such programs from the districts' certifications as to days and minutes of instruction . . . " (the "Channel One Advisory");<sup>25</sup>

(2) Fiscal Management Advisory 89-04 which "purports to limit the discretion of local school districts by requiring the districts to restrict to a maximum of twenty hours the amount of time a student may work each week" (the "Work Permit Advisory");

(3) Two related Program Advisories: Numbers 89/9-2, dated October

12, 1989, and 89/9-5, dated November 6, 1988, which "expressly purport to formulate standards to interpret the supplementary grants program created by legislation implementing Proposition 98"<sup>26</sup> (the "Supplemental Grants Advisories"); and

(4) Program Advisory 87/8-2, dated August 26, 1987, which "provides 'advice' concerning the use of categorical program funding after the 'sunset' of the provisions in the authorizing legislation regarding such use" (the "Categorical Funding Sunset Advisory").

The next development in this story, which concerned the Channel One advisory, is summarized by the California Court of Appeal in *Dawson v. East Side Union High School District* (1994) ("*Dawson*");<sup>27</sup>

"In October 1990 California's State Board of Education adopted a resolution, headed "USE OF COMMERCIAL TELEVISION ADVERTISING IN THE CLASSROOM," which stated the Board's belief that 'decisions concerning the use of commercial products and services are within the decision making authority of the local governing boards, consistent with state law.' The resolution encouraged local governing boards to use care in considering and auditing use of electronic media in the classroom. The Superintendent of Public Instruction forwarded this resolution to local school officials with a cover letter in which he stated that the resolution 'has been characterized as supporting the use of . . . "Channel One" ' and that 'I disagree with [the] resolution,' and briefly reviewed his August 1989 arguments against 'Channel One.' The president of the State Board of Education then wrote to the same officials, stating that 'the State Board of Education neither supports nor opposes the use of Channel One in the classroom. . . . Our resolution simply states that the decision[s] concerning the use of commercial products and services are the domain of local governing boards, consistent with state law.' "

In April 1991, OAL published a summary of this Request for Determination in the *California Regulatory Notice Register*,<sup>28</sup> along with a notice inviting public comment. OAL received no public comments except from the Little Hoover Commission, which submitted a comment ("Comment") in May 1991. The Department<sup>29</sup> submitted its response to the request for determination ("Response") in June 1991.<sup>30</sup>

Meanwhile, a public high school in the San Jose area had begun showing Channel One to its students. After consultations with parents and teachers, the East Side Union High School District had decided to authorize use of Channel

One at Overfelt High School. The local board had concluded that the video news programs and the free electronic equipment would be of great benefit to Overfelt High, which (1) had a high proportion of "at-risk," low-income, minority students and (2) lacked the funds either to provide basic educational programs or to deal with social problems such as drug abuse and teen pregnancy.<sup>31</sup>

Superintendent Honig had tried unsuccessfully in May 1990 to persuade the local board to disapprove the Channel One contract. Then, in the words of the *Dawson* court:

"[i]n December 1991 the Superintendent of Public Instruction, joined by the California Congress of Parents, Teachers, and Students, Inc., and by two teachers at Overfelt, sued the school district for preliminary and permanent injunctions against contracting for or using 'Channel One,' for a declaration that the school district's use of 'Channel One' was illegal in various respects . . . . Whittle [the developer of Channel One] was granted leave to intervene in the lawsuit."

A friend of the court brief supporting the showing of Channel One was filed by the California Hispanic Superintendents' Association, the Association of Mexican American Educators, the League of United Latin-American Citizens, and the Mexican-American Political Association and the Latino Issues Forum. A second friend of the court brief opposing the showing of Channel One was filed by the California Teachers Association.

In November, 1992, the Santa Clara Superior Court rejected the effort to forbid the local district to use Channel One. In September 1994, the California Court of Appeal, Sixth District, also rejected the effort to forbid use of Channel One in *Dawson v. East Side Union High School District*. (Acting Superintendent Dawson was substituted for former Superintendent Honig as plaintiff.)

The *Dawson* Court saw the key issue in the case as preserving local control over public schools. It found that no duly adopted provision of law prohibited local districts from exercising their discretion "to adopt or permit uses or procedures which in and of themselves are not strictly educational so long as the uses or procedures are no more than incidental to valid educational purposes."<sup>32</sup> The Court declined to "develop educational policy" by banning showing of Channel One. The Court stated:

"We are by no means insensitive to the will of the people, to which counsel for the Superintendent of Public Instruction referred at oral argument. But our system of government requires--probably in part as a

safeguard against possible misunderstanding--that a *court of law receive the will of the people* not by way of presentations made by articulate advocates for particular causes but rather *by way of the co-equal legislative and executive branches, in the form of statutes or administrative regulations having the force of law*. A court cannot be, as plaintiffs repeatedly urge us to be, a substitute Legislature." (Emphasis added.)<sup>33</sup>

### Department's Response

In its Response, the Department makes several general arguments, then discusses each advisory (and Requester's arguments) separately. First, the Response notes that the Department "began corrective measures to assure its compliance with all pertinent APA requirements" after it received OAL's adverse determination (1990 OAL Determination No. 6) regarding Department Policy Memorandum No. 88-11.<sup>34</sup> The Department explains that its compliance efforts have

"resulted in the implementation of strict internal departmental procedures controlling any written guidance of general applicability concerning all programs administered by the department. The control procedures are embodied in the Department's Administrative Manual, sections 11400 to 11402. (Attachment A) [Relevant provisions were attached to Response]. The procedures are focused on the CDE's somewhat unique authority under Education Code section 33308.5 to issue advisory, non-prescriptive program guidelines."<sup>35</sup>

Next, the Response argues that departmental staff have been instructed to respond to school district inquiries that there is no requirement that district comply with any departmental advisory;<sup>36</sup> that school district attorneys tell their clients that the districts need not "follow or abide by anything the Department states in any of its advisories other than a requirement stated in a statute or duly-adopted regulation."<sup>37</sup> The Department contends that while certain advisories may arguably appear "by their own terms" to be prescriptive in nature, that "none of those to whom the documents were directed understood them as such," i.e., that the districts did not feel compelled to comply.<sup>38</sup>

A contrasting perspective on how school districts view these departmental bulletins appears in the Little Hoover Commission's 1990 report entitled *K-12 Education in California: A Look at Some Policy Issues*:

" . . . at one of the Commission's public hearings on education, the president-elect of the California School Boards Association testified that

local education agencies view the Department's guidelines as mandatory. Specifically, the president-elect agreed that the guidelines, in practice, are 'orders or regulations that should be complied with and if they are not complied with there is some real penalty to the district that doesn't comply.' She further stated that 'while [the guidelines] may say the word "recommendation," and they may say they are advisory, that fact of the matter is that in order to get "check-off" on compliance in programs you have to adhere to the guidelines.' She also described as 'almost insidious' the Department's issuance of guidelines 'because they are couched as advisories'<sup>39</sup> as opposed to going through the process of becoming administrative regulations[s] and having administrative law.' and added that [i]t would be far preferable to have the process in place where the input was clearly given prior and then [the guidelines] did have force of law, than to have it come through the back door internally from the Department and have to, basically, organize a rebellion . . . to [force] political pressure to change them.'<sup>40</sup>

The Response then addresses "two assumptions and generalizations" the Little Hoover Commission made in its Request. First, the Response rebuts the Comment's implicit charge that only the *Board* of Education has rulemaking authority with respect to the government of elementary and secondary schools. Attached to the Response is a list of legislative authorities granting the Superintendent of Public Instruction rulemaking authority in a variety of areas.<sup>41</sup> OAL does not dispute that the Department has rulemaking authority for various programs and functions.

Secondly, the Response discusses the claim made in the Comment that

"none of these Advisories is subject to Education Code §33308.5, which appears to exempt the issuance of 'program guidelines' from the APA process, but only *if* such "guidelines" are just a 'model or example', [sic] *not* prescriptive and include *written notification* that they are 'merely exemplary' and 'not mandatory'" (Emphases in original).<sup>42</sup>

The Response observes, quite indisputably, that the Commission neither explains nor offers citations for its conclusion, and that Education Code Section 33308.5 "does not restrict the subject matter of a program guideline issued by the SPI." As discussed above, the Commenter's assumption that Education Code Section 33308.5 would "exempt" certain issuances from the APA under certain circumstances is fallacious insofar as it assumes that a Departmental directive *otherwise subject to the APA* would be exempt.

Counsel for the Department and Superintendent makes two additional general

arguments: (1) OAL, like a court, must defer to an agency's interpretation of its statute; thus, if the agency claims that its interpretation is the only viable one, OAL cannot find that the agency has interpreted, implemented, or made specific the statute without complying with the APA; and (2) whenever OAL issues a determination under Government Code Section 11347.5, OAL's own interpretation and implementation of Government Code Section 11342, subdivision (b), defining a "regulation," violates Government Code Section 11347.5.

The Department anticipates our lengthy discussion of the "only legally tenable interpretation" principle below. It is true that an agency need not adopt its interpretation as a "regulation" pursuant to APA procedures *if* the interpretation is the only legally tenable one of the particular statute the agency must administer. It is also true that the Legislature has authorized OAL to issue its determination as to whether an agency's "guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" is a "regulation" as defined in Government Code Section 11342, subdivision (b). Thus, the Legislature has charged OAL with determining whether a particular guideline, standard, or rule expresses the "only legally tenable interpretation" of an agency's governing law.<sup>43</sup>

Accordingly, we must reject the contentions (1) that OAL is bound by an agency's conclusion that a challenged administrative rule constitutes the only legally tenable interpretation of governing law<sup>44</sup> and (2) that OAL invariably violates Government Code section 11347.5 each time it issues a determination!<sup>45</sup> Acceptance of either of these ambitious contentions would not only fly in the face of clear legislative intent, but also eliminate a useful tool for facilitating agency accountability and responsiveness. Details of these contentions and our reasons for rejecting them may be found in notes 44 and 45.

The Department raised the following arguments with respect to the individual Advisories challenged by the Little Hoover Commission.

(1) Legal Advisory 2-89, dated May 24, 1989, the Channel One Advisory:

First, the Department argues that OAL must limit its review to the Executive Summary of the Legal Advisory because the Response does not name the "Press Release" separately as part of the Request. The Response also points out the inaccuracy of Requester's claim that the Advisory "compels local school districts to reject 'Channel One' . . . by threatening to delete the portion of the time spent viewing such programs from the districts' certifications as to days and minutes of instruction . . . ." <sup>46</sup> Instead, as the Response correctly notes, the Advisory states:

"SDE will not accept certifications as to days and minutes of instruction from school districts and county offices of education to the extent that they include *time spent* by pupils *viewing commercials* as part of a 'Channel One' news program or other similar programs."<sup>47</sup> (Emphasis added.)

The Department argues:

(1) that the Advisory merely states a "fact:" that the Department "will not accept time spent viewing commercial advertisement[s] as instructional time."<sup>48</sup>

(2) that the Advisory merely expresses the Department's "*opinion* that the imposition of forced commercial advertising upon K-12 students in return for valuable compensation as a condition to an educational program is not . . . consistent with the purposes for which schools were created and may constitute a violation of the free school clause of Article IX, Section 5 of the California Constitution (emphasis added);"<sup>49</sup> and

(3) that, although the Request notes that the Advisory does not contain a Section 33308.5 disclaimer, Requester's counsel "has previously advised the SBE [the State *Board* of Education] that '...legal and fiscal advisories are outside the scope of Section 33308.5[]' [and] no significance can be attributed to the failure to provide the caution . . . ."<sup>50</sup>

(2) Fiscal Management Advisory 89-04, the Work Permit advisory:

The Department points out that this advisory *does* contain a Section 33308.5 disclaimer at page 6, i.e., that it states that "compliance with these guidelines is not mandatory." In addition to the Superintendent's phrasing ("I am asking you to join with me to limit the amount of time a student can work each week . . . "), the Advisory uses the term "should" rather than an unequivocally mandatory term. The Department characterizes the Advisory and its cover letter as a whole as a *request* which does not add any statutory interpretation or specific legal mandates beyond those the law already requires.

(3) Program Advisory 89/9-2, the first Supplemental Grants advisory:

The Department states that this advisory "was intended to describe . . . the requirements of the newly-passed Supplemental Grants program." The Department maintains that Advisory 89/9-2 contains nothing that can be "construed as a *new* requirement, not already contained in the statute." (Emphasis in original.) The Department further explains that any discussion

beyond the bare contents of the statute constitutes "suggestions not requirements." Program Advisory 89/9-2 also contains language similar to that of Section 33308.5:

"This advisory contains information regarding Supplemental Grants that is *advisory* only. For any interpretation of the law itself, you may wish to consult your legal counsel."<sup>51</sup> (Emphasis in original.)

The Response notes that Program Advisory 89/9-5 supplements the earlier Program Advisory 89/9-2. The Department states:

"To the extent that Program Advisory 89/9-5 was issued for 'clarification,' the clarification was not to the statute itself. Rather, CDE was advising the districts and county offices that a widely-disseminated interpretation of the statute by several school consulting groups was contrary to the express requirements of the statute; CDE was not interpreting the statute; CDE was criticizing an erroneous interpretation of the statute that was creating confusion in the field. Dispelling a false interpretation is not a regulation."<sup>52</sup>

The Department also argues that, since 89/9-5 was "unambiguously related to, and included as part of, a prior advisory," it does not need a separate 33308.5 disclaimer. Finally, the Department argues that the Requester's challenge to the last sentence of 89/9-5 as prescriptive (it requires districts to sign an assurance that they are complying with statutory requirements) is misplaced because

"[r]equiring . . . assurances of compliance with *existing* requirements is no more a 'regulation' or 'standard of general application' than designing a standard form on which to report required information. It is a 'housekeeping' matter, not a regulation under Government Code section 11342." (Emphasis in original.)

(4) Program Advisory 87/8-2, the Categorical Funding Sunset Advisory:

The Department explains that it was critical that it publish this advisory because, when the sunset of several statutes governing programs took effect on June 30, 1987,

"many educators were under the incorrect impression that there were *no* remaining legal requirements regarding the five categorical programs which had 'sunset' pursuant to the provisions of Education Code Section 62002.2. It was incumbent upon CDE to inform the districts which

operated these programs (virtually every district in the state) what the 'sunset' statutes themselves stated."<sup>53</sup> (Emphasis added.)

In response, the Department makes several arguments. First, it points out that the Requester errs in stating that Section 62002 is the "*only* legislative guidance on the questions addressed in the Advisory." (Department's added emphasis.) The Response cites Section 62000, as it appeared from 1986 until amended by Statutes of 1991, which in turn cites five provisions including 62002 which generally govern funding of the programs once they "sunset."

Second, the Department describes its advisory as "a conduit for the new statutory requirements themselves; [one which] did not add to or detract from the five statutes" and therefore lacks any regulatory effect.<sup>54</sup>

Third, the Department argues that the advisory contains the "only viable understanding" of what legal requirements remain for the programs once the sunset has taken effect, noting that "OAL should pay deference" to the Department's understanding based on its "long historical familiarity with each of these five programs."<sup>55</sup>

Finally, the Department addresses the two specific examples in the Request by explaining, with appropriate references, that each statement in the Advisory is "no more than a facial, non-interpretive reading" of the applicable state and/or federal law.<sup>56</sup>

In summary, the Department argues that Section 33308.5 "exempts" many of the challenged documents from the requirements of the APA; that many of the challenged documents merely restate or express the only legally tenable interpretation of the law in question, and OAL must defer to the Department's judgment that *the Department's* interpretation is the only "viable" one; that OAL is engaging in "underground regulation" whenever it issues a determination under Government Code Section 11347.5; that the Requester misstated various points and failed to provide a factual basis for the claims; and that requiring assurances of compliance with existing requirements is merely "housekeeping" and not an additional regulatory requirement.

We will address these various arguments in context in the following analysis.

### III. ANALYSIS

This analysis addresses the following key issues with respect to each of the challenged advisories:

- A. DOES THE APA GENERALLY APPLY TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS?
- B. DO THE CHALLENGED ADVISORIES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?
- C. DO THE CHALLENGED ADVISORIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY GENERALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS?

**A.**

**DOES THE APA GENERALLY APPLY TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS?**

Government Code Section 11000 states in part:

"As used in this title ['Government of the State of California'] '*state agency*' includes every state office, officer, *department*, division, bureau, board, and commission." (Emphasis added.)

This statutory definition applies to the APA, that is, it helps determine whether or not a particular "state agency" must adhere to the APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also part of Title 2 of the Government Code: i.e., Chapter 3.5 of Part 1 of Division 3.

The APA somewhat narrows the broad definition of "state agency" given in Government Code Section 11000. In Government Code Section 11342, subdivision (b), the APA provides that the term "state agency" applies to *all* state agencies, *except* those in the "judicial or legislative departments."<sup>57</sup> Since neither the Department nor the Board is in the judicial or the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to their quasi-legislative enactments.<sup>58</sup>

In addition, the Department's enabling statute expressly requires the Board and by extension the Department to comply with the "laws of this state" when it adopts rules. The "laws of this state" would certainly include the APA.<sup>59</sup> Therefore, we conclude that the APA rulemaking requirements generally apply to both the Board and the Department.<sup>60</sup>

**B.**

**DO THE CHALLENGED ADVISORIES CONSTITUTE  
"REGULATIONS" WITHIN THE MEANING OF  
GOVERNMENT CODE SECTION 11342?**

In part, Government Code Section 11342, subdivision (b), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application or the amendment, supplement or revision of *any* rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . ." (Emphasis added.)

Government Code Section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation[']* as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." (Emphasis added.)

In *Grier v. Kizer*,<sup>61</sup> the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code Section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application *or*
- o a modification or supplement to such a rule?

Second, has the agency adopted the challenged rule to either

- o implement, interpret, or make specific the law enforced or administered by the agency *or*
- o govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the *Grier* court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" (Emphasis added.)<sup>62</sup>

Three subsequent California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA. The first case is particularly germane to the discussion.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "'a statutory scheme which the Legislature has [already] established. . . .'"<sup>63</sup> But

"to the extent that any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."<sup>64</sup>

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins. For example, in turn, *Union of American Physicians and Dentists v. Kizer* (1990)<sup>65</sup> held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.<sup>66</sup> Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process. We will consider whether each Advisory in turn merely restates those rules contained in an existing statutory or regulatory scheme, or whether the Advisories contain rules which depart from or embellish upon these existing rules, policies, requirements, or prohibitions.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* ("*SWRCB v. OAL*") (1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . ."  
(Emphasis added.)<sup>67</sup>

For each of the five challenged Advisories, we will analyze, first, whether it is a standard of general application or a modification or supplement to such rule or standard; and secondly, whether the challenged rule (1) interprets, implements, or makes specific the law enforced or administered by the agency, or (2) governs the agency's procedure.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>68</sup>

(1) Legal Advisory 2-89, dated May 24, 1989, the Channel One Advisory:

The challenged Legal Advisory "advises" that the Department will not reimburse schools for time pupils spend "viewing commercials as part of a 'Channel One' news program or other similar programs."<sup>69</sup> It applies to all County and District Superintendents, the addressees of the advisory. The Advisory is thus clearly a document intended to have general application. The following discussion will analyze whether the contents of the Advisory are "standards" or "rules" which implement, interpret, or make specific the statutes the Department enforces.

The Department urges that the Legal Advisory is "advisory" rather than "regulatory." In response, we note that this document is "advisory" not in the sense that it gives "advice" which the reader may choose to follow or not, but in the sense that a hurricane advisory from the National Weather Service is "advisory;" that is, it states that a particular occurrence is on the way.<sup>70</sup> In this case, that occurrence is that the "SDE will not accept certifications as to days and minutes of instruction from school districts and county offices of education to the extent that they include time spent by pupils viewing commercials . . . ." (Emphasis added.)<sup>71</sup>

The challenged document contains two parts: a three-page News Release entitled "California Turns Off 'Channel One,'" dated "5/25/89," and a three-page "Legal Advisory" labeled "Executive Summary," and dated May 24, 1989. The News Release concludes

"Attached is the executive summary of the State Department of Education's Legal Advisory on commercial broadcasts. A longer version of the Advisory is currently in preparation and will be issued next week."

As noted in the summary of the Department's Response, the Department argued that OAL should not consider the News Release in addition to the Legal Advisory because the Requester did not specifically identify it in the initial Request and OAL did not enumerate it separately in its letter of April 22, 1991.<sup>72</sup> Although neither document named the News Release separately, the Requester initially submitted the Legal Advisory as part of the News Release.<sup>73</sup> The News Release helps illuminate the Department's legal basis for its Legal Advisory, but states no "rule" in addition to that which the Advisory contains.

Most importantly, OAL must determine whether the "standard of general application" or "rule" itself is a "regulation;" not whether the particular embodiment, whether denominated a "Legal Advisory," a "News Release," or some other title, is a "regulation." OAL must make its determination with respect to the *substance* of the challenged rule or policy.<sup>74</sup> The ultimate issue to be resolved remains whether or not the Department promulgated a rule or standard of general application subject to the APA when it stated that it would not accept certifications for days and minutes of instruction to the extent they include time pupils spend viewing commercials as part of "Channel One" or other news programs. The Department's argument about whether the rule appears in a document labelled "Advisory" and/or a "News Release" misses that point.

The News Release is inextricably related to the attached Legal Advisory Executive Summary, and does not present a challenged rule or standard separate from the policy the Advisory expresses. The Department's failure to address the News Release separately from the Legal Advisory does not detract from its arguments in any way. Reference to the News Release in the following discussion and analysis will not harm the challenged agency. Thus, OAL will consider the two documents as a whole, and not artificially separate them.

Before turning to the contents of the challenged Legal Advisory, we will address the remaining arguments set forth in the Response and directed at the Channel One Advisory. The Department astutely points out that Mr. Dickstein, counsel for the Little Hoover Commission, misstated the contents of the Advisory, quoting the Request's claim that the Advisory "compels local school districts to reject 'Channel One' and other similar television news programs containing advertising by threatening to delete *the portion of the time spent viewing such programs* from the districts' certifications as to days and minutes

of instruction, thus adversely impacting state reimbursements to the districts." (Emphasis added by Department.)

As the Department states, the Advisory "speaks for itself," plainly stating that the Department will not accept certification for time spent viewing the *commercials* in such programs, not time spent viewing the remaining minutes of the program. This clarification does not alter the issue: whether the Department has issued, enforced or tried to enforce a standard of general application regarding reimbursement for time spent watching certain minutes of television programs in the classroom. The Requester's overly broad restatement of the policy contained in the attached documents is irrelevant to OAL's analysis as to whether the policy the Department *has* expressed is a rule or standard of general application. OAL bases its determination regarding the challenged rule on the rule or policy revealed in the departmental documents submitted; OAL does not base its determination on the Requester's characterization of the agency's challenged rule or policy.

The Department disputes the characterization that it used "a vague reference to the free school clause in Article II [sic], Section 5 of the California Constitution."<sup>75</sup> In response, it repeats its assertion that:

"SDE is also of the opinion that the imposition of forced commercial advertising upon K-12 students in return for valuable compensation as a condition to an educational program is not authorized because it is not consistent with the purposes for which schools were created and may constitute a violation of the free school clause of Article IX, Section 5 of the California Constitution."<sup>76</sup>

The Department then notes that "[t]his is merely a statement of opinion. It is not prescriptive, it neither is, nor does it purport to be, a justification for the statement of fact set forth in the prior paragraph." Once more, the less than precise manner of the Requester's expression is irrelevant to OAL's determination of the issue. Further, the Department's *opinion* regarding potential violation of the free school clause might explain or support its policy of refusing to accept certification for time spent in a particular manner; whether or not the challenged documents express the Department's opinion is not at issue. There *is* a legal issue related to the Department's interpretation of the free school clause: is the Department's determination that forbidding reimbursement for time spent watching television commercials the only legally tenable conclusion one could reach in light of the free school clause and other relevant provisions of California law? We will discuss that question below. We do not dispute that the Department was expressing its opinion in the cited paragraph, and do not believe there can be any doubt as to whether that

expression alone is regulatory; it is not.

Finally, the Department raises a fourth, somewhat tangential, argument regarding the Channel One Advisory.<sup>77</sup>

The Department summarizes its arguments regarding the Channel One Advisory by concluding that

- (1) the Little Hoover Commission's counsel's legal analysis and conclusions are flawed;
- (2) each of counsel's statements regarding the Legal Advisory is inaccurate; and
- (3) all that remains of the Requester's argument is "the bare conclusion . . . that 'this document is clearly a rule or standard which interprets, implements and makes specific the law in this area.' Absent any factually accurate analysis as to *how* the advisory does this, it would be futile to attempt any further response."<sup>78</sup> (Emphasis in original.)

Unfortunately, the Department nowhere directly addresses the issue of whether its Advisory does anything other than set out a rule of general application intended to affect *all* county and school district superintendents.

### **CHANNEL ONE ADVISORY**

For convenient reference, we will describe the contents of the Channel One Legal advisory here. Addressed to "All County and District Superintendents," the Advisory's subject is "Requiring Students to View 'Channel One' and Other Similar Television Programs Sponsored by Commercial Advertisers." The Executive Summary starts by briefly summarizing Whittle Communications' ("Whittle") offer to some high schools of a "news/current events program consisting of 12 minutes per day, two minutes of which are devoted to commercial advertising."<sup>79</sup>

Whittle provides schools which agree to contract for Channel One programming with free satellite, video recording, and television monitoring equipment, and their maintenance. In return, the school must agree:

- ⊗ "to show 'Channel One [sic] every schoolday to all high school students at the same time for three (3) years;
- ⊗ "not to contract with any similar media/communication companies for

three (3) years.

"if the above is agreed to, then the school is free to use the equipment for anything additional it wishes."

The Advisory then provides a "Fiscal Summary," concluding that "[i]f every high school and middle school student were forced to watch commercials every day for 180 days and the schools billed the state, the amount would be . . . \$48,052,332."

The Advisory's next section, "Educational Considerations," summarizes the Department's major policy concern: that educators would be turning over their control of curriculum to commercial interests, and, once one such program is present in schools, others may follow.<sup>80</sup> The Department concludes:

"In the State Department of Education's (SDE) view, schools should not be in the business of commercial advertising."

This statement expresses a strong policy discouraging schools from showing commercially sponsored programs in the classroom, but does not prohibit schools from doing so. This portion of the advisory does not contain a rule or standard of general application, but rather a strong policy expression which might not contain regulatory material--until the next paragraph.

The Channel One Legal Advisory continues:

"SDE *will not accept* certifications as to days and minutes of instruction from school districts and county offices of education to the extent that they include time spent by pupils viewing commercials as part of a 'Channel One' news program or other similar programs. Such time *will be deleted* from the certification. Any apportionment, including longer day and longer year, will reflect the resulting adjustment to the computation of average daily attendance. No apportionment will be authorized if the adjustment results in a failure to meet the minimum number of required instructional days and minutes.

"SDE is also *of the opinion* that the imposition of forced commercial advertising upon K-12 students in return for valuable compensation as a condition to an educational program is *not authorized* because it is not consistent with the purposes for which schools were created and may constitute a violation of the free school clause of Article IX, Section 5 of the California Constitution."<sup>81</sup> (Emphasis added.)

**Has the Department interpreted, implemented, or made specific provisions of law which it administers?**

Does this Advisory implement, interpret or make specific the law the Department administers? Yes, in part. We will discuss the law applicable to each Advisory in turn, then analyze whether the Advisory interprets, implements, or makes specific that law.

A recurrent theme in underground regulations cases is whether or not the state agency could have adopted *other* policies in the process of implementing applicable laws. The courts (and OAL) recognize that if there is only *one* reasonable way to interpret a statute (only one "legally tenable interpretation"), then an agency that issues a rule reflecting this interpretation is not violating the APA.<sup>82</sup> By contrast, however, if the statute is subject to more than one interpretation, the APA requires that the agency propose this *selected* interpretation for adoption as a regulation and then proceed through the APA rulemaking process. The rationale for this requirement is that the agency is in effect making new law at this juncture and should involve the public in the policy formation process. For instance, one reasonable interpretation of a statute might lead to benefits being made *more* widely available (at greater cost to the State), while a second reasonable interpretation might lead to benefits being made *less* widely available (at lesser cost to the State but perhaps to the detriment of some of the affected public). If the more expansive (and expensive) interpretation is adopted by the rulemaking agency through APA procedures, the Department of Finance will have the opportunity to review the proposed action to ensure that funds have been appropriated to support this costlier alternative.<sup>83</sup> Similarly, members of the public will the opportunity to voice their opinions.

Also, for ease of access for agency staff and regulated public alike, the agency interpretation should be printed in the California Code of Regulations. It should not be necessary to pore over manuals or to leaf through binders of administrative bulletins ferreting out pertinent agency policies.

Thus, a fundamental issue in analyzing each Advisory is whether or not each rule reflects the *only* reasonable interpretation of governing law.

**Channel One Advisory--Only Legally Tenable Interpretation?**

**Is the Department's Interpretation regarding Channel One Reimbursement the Only Legally Tenable Interpretation of the Law?**

Is the Department's pronouncement that it cannot certify and reimburse Channel

One commercial viewing time the only legally tenable interpretation of the applicable California law -- constitutional, statutory, and regulatory? Or, could the Department choose to certify and reimburse the time pupils spend viewing commercials in commercially produced "educational" news programs? No party has disputed the basic facts set out in the Legal Advisory: Whittle Communications ("Whittle") will provide to any contracting school certain electronic equipment in exchange for the school's promise that its students will view the twelve-minute Channel One news program, including two minutes of commercials, daily at the same time for three years. The Department concluded that the value of the students' time (two minutes per day for 180 days) billed to the state would be \$48,052,332, counting all California students in grades 7-12. This calculation apparently rests on California's method of financing schools based on the students' certified average daily attendance; thus one may place at least a theoretical value on each minute of a student's schoolday.<sup>84</sup>

The Department maintains that the "forced" viewing of commercials is tantamount "to cavalierly sell[ing] students as a commodity,"<sup>85</sup> that is, imposing "forced commercial advertising upon K-12 students in return for valuable compensation as a condition to an educational program . . . ."<sup>86</sup>

The Department then argues that this activity or exchange is "not permissible" for three reasons: (1) it is not an "educational activity" within the meaning of Education Code Section 46300; (2) it is a "commercial enterprise" inconsistent "with the purpose for which schools are created;" and (3) it may violate the "free school guarantee" of the California Constitution.<sup>87</sup> We will discuss each argument in turn.

#### "Educational activity"

Education Code Section 46300 provides in part:

"(a) In computing average daily attendance of a school district or county office of education, there shall be included the attendance of pupils while engaged in *educational activities* required of those pupils and under the immediate supervision and control of an employee of the district or county office who possessed a valid certification document, registered as required by law." (Emphasis added.)

The Department has not yet formally defined the term "educational activities" as used in this paragraph, although it has adopted related regulations. Section 402, Title 5, CCR, provides in part:

"For apportionment purposes, attendance of a pupil upon schools or classes maintained by a school district or a county superintendent may be counted when the pupil is present during the time lawfully prescribed for the school or class in which he is enrolled and when such attendance *meets the requirements prescribed by Education Code Section 46300.*" (Emphasis added.)<sup>88</sup>

Do "educational activities" necessarily *exclude* the two minutes of commercials which are part of each twelve-minute Channel One news program? Neither statute nor regulation defines the term for purposes of "average daily attendance" (or "ADA"). Nor do the Courts devote much time to analyzing what does or does not constitute an "educational activity." A recent case did analyze, for the purpose of determining whether a school district could charge fees, whether driver training (i.e., the "laboratory portion" of the driver education course) was "*educational in character.*"<sup>89</sup> The Court concluded that it *was*, based on the unique character of driver training both factually and legislatively, and in light of the leading cases interpreting the free schools clause of the California Constitution, discussed more fully below.

Several California Attorney General's opinions discuss "educational activities" for the purpose of computing ADA, although none is definitive. In 1951,<sup>90</sup> the Attorney General responded to a question about how to count classes which were longer or shorter than 50 minutes for apportionment purposes. Without defining the term "educational activities," the Attorney General cited Education Code Section 6904, the substantially similar predecessor of Section 46300, and opined that:

"If the activities mentioned in this question are *required educational activities within the meaning of Education Code section 6904*, attendance thereon may be counted in terms of 'class hours.'" (Emphasis added.)

In 1962, the Attorney General rendered an opinion as to whether high schools or junior colleges could charge fees for bowling classes, what effect attendance at such classes would have on average daily attendance apportionments, and related questions.<sup>91</sup> The Attorney General concluded in part that:

"(1) A high school district may not charge fees for elective bowling classes offered by the district;

"(2) Under the present applicable regulations of the State Board of Education, no reduction of average daily attendance apportionment moneys to the district would be made with respect to such classes *where the pupils enrolled in them also attend at least four hours of classes for*

*which no fee is charged, and which are otherwise includable in computing average daily attendance."*<sup>92</sup> (Emphasis added.)

In discussing the effect on ADA apportionment, the Attorney General notes that reductions are necessary only when the attendance is for *less than* a minimum day. The opinion quotes the applicable regulation in effect at the time<sup>93</sup> and notes that the computation of average daily attendance may *not* include classes for which fees are charged.<sup>94</sup>

A third Attorney General's opinion<sup>95</sup> determined without any analysis that "[a]ttendance at sessions of the [Christian Anti-Communist] 'Crusade' would not constitute attendance 'in *educational activities* required of such pupils [quoting language of Education Code Section 11251 which was a substantially similar to that of current Section 46300; emphasis added.] . . . .' Only attendance as provided by Education Code Section 11251 may be counted for apportionment purposes."<sup>96</sup>

Neither the Legislature nor the Department has yet defined "educational activities" as used for ADA reimbursement. Many otherwise unobjectionable educational activities require measurable periods of incidental noneducational activity--activities such as lining up, traveling to and/or waiting for field trips or cultural activities; seating and introducing a guest speaker; all the various logistics and mechanics of a number of indisputably educational activities.

While the Legislature or the Department could further define "educational activities," limiting incidental activities or prohibiting commercial viewing as an educational activity, neither has yet done so. Absent a clear legislative or regulatory definition, it is a policy decision, not an unembellished restatement of the law, to conclude that two minutes of commercial viewing in connection with an otherwise educational program is not incidental, de minimis, or part of an educational activity.

### **What is the Law regarding Channel One in California and Nationwide?**

#### **Channel One and the Free School Clause in California**

Does the "free schools" guarantee of the California Constitution prohibit the Department from reimbursing schools for time students spend viewing Channel One commercials? If so, then the Legal Advisory is not a "regulation" but an unembellished restatement of the governing law.

Section 5, Article 9, of the California Constitution provides:

"The Legislature shall provide for a system of common schools by which *a free school* shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."<sup>97</sup> (Emphasis added.)

As noted in an early case,

"In pursuance of [this] section, the legislature has established a system of common schools and has gone into much detail in relation to the organization, government, and maintenance of the system . . . . "  
*Malaley v. City of Marysville*.<sup>98</sup>

California's premiere case interpreting the impact of the "free schools" guarantee on fees for school activities is *Hartzell v. Connell*.<sup>99</sup> It holds unequivocally that the school district fee program for extracurricular drama, music and athletic events at issue violates both the free schools clause and a valid State Board of Education administrative regulation which prohibits fees for participating in school activities unless authorized by law.

Had the evolution of California law stopped there, the Department might have a stronger argument that the California Constitution forbids reimbursing schools for time students spend watching television commercials connected to an educational news program. Even under *Hartzell* alone, however, the argument would have to rely on a somewhat strained analogy which ignores the most fundamental underlying reason for strictly prohibiting fees for scholastic activities: the fear that fees, no matter how small, might exclude some students from the activity for financial reasons.<sup>100</sup>

The Department's analogy between Channel One viewing and fees must begin by equating each student's two minutes of commercial viewing to a *payment* in the student's time rather than money, time which can be evaluated at the rate of reimbursement based on ADA which the school receives for that student's verified attendance in educational activities.<sup>101</sup> Another analogy likening the students' time to a fee or payment would be that of requiring each student to work in the school cafeteria or school garden as a pre-condition to participating in another school service or activity. Or, one could measure the children's time in terms of the value to the advertisers of two minutes a day aimed a captive audience in its target demographic group.<sup>102</sup> Or one could evaluate the time investment as measured by the programming, other services, and equipment Whittle provides in exchange. Thus, one can, at least technically, place a value--or several values--on the students' time. These evaluations may displease some and may even raise serious questions as to sound public policy; however, unlike fees, none of them distinguish among students or schools<sup>103</sup> on

the basis of income, resources, or willingness to invest in educational activities.

The *Hartzell* Court's discussion suggests that the Court as constituted in 1984 might, by analogy, have extended its holding to a situation in which literal "fees" were not the issue. Conjecturing as to the results of that Court's hypothetical activities is, however, not only supremely speculative but also relies on an analogy that is strained at best.<sup>104</sup>

More recently, the California Supreme Court, in *Arcadia Unified School District v. State Department of Education* (1992)<sup>105</sup> upheld the constitutionality of a statute allowing school districts to charge fees for pupil transportation. Pivotal was the determination that school transportation is *not* necessarily an integral part of the educational program. Particularly relevant to our inquiry is the Court's note, in discussing the required deference to the Legislature, that

"It is important to recognize that the challenged act here is a legislative act. As a result, this situation is fundamentally different from that in *Hartzell v. Connell* [citation omitted.] . . . ." <sup>106</sup>

The *Arcadia* Court chose to narrow *Hartzell*, although not necessarily compelled to do so, as the eloquent dissent by Justice Mosk shows.<sup>107</sup> By rejecting Justice Mosk's reasoning, the Court interprets the "free schools" guarantee of the California Constitution to permit certain fees, as expressed not only by the statute in question, but also by Section 350 of Title 5 of the CCR.<sup>108</sup>

Justice Richardson's dissent in *Hartzell* suggests one of the most interesting issues regarding the extent of California's constitutional free schools guarantee. Justice Richardson's reasoning clarifies that if the constitutional free schools guarantee were as absolute as the majority appeared to describe it, then an administrative regulation prohibiting fees for participating in school activities *unless otherwise specifically authorized by law* would be invalid as inconsistent with the constitutional provision.<sup>109</sup>

The very existence of Section 350, Title 5, CCR, and the *Arcadia* Court's approval of Education Code Section 39807.5 demonstrate that Section 5, Article 9 of the California Constitution, the "free schools" clause, does not prohibit fees for participating in school activities under all circumstances. The Legislature, the Board, and the Department each have the discretion to interpret the extent of the free school clause, including which activities fall within its protection. However, nothing about the constitutional provision exempts each legislative or quasi-legislative body from its duty to comply with all otherwise applicable legal and procedural requirements.

Likewise, in a situation like the one presented by Channel One's programming and commercials, California's policymakers have the discretion to set parameters as to when or whether the "spending" of students' time becomes tantamount to charging a fee, and when the time spent is merely incidental to an otherwise educational activity. As both California case law and the analyses of other jurisdictions demonstrate, there is latitude for a range of policy decisions based on constitutional and statutory provisions. In fact, in an area open to such a far-ranging debate, policymakers may have not only the latitude to establish standards, but also the duty to do so.

### **California Legislative History re Channel One**

Since 1990, the Legislature has considered several bills which either would prohibit or regulate Channel One and similar programming, but has so far enacted none of them.<sup>110</sup>

Most recently, in March 1993, Senator Torres introduced Senate Bill 1047 to prohibit school district governing boards from entering into written or oral contracts that permit advertisements to be transmitted to pupils by any electronic medium during the schoolday, and to prohibit the State Board of Education (SBE) from granting a waiver of these provisions.<sup>111</sup> The bill passed the Senate, but failed in the Assembly.<sup>112</sup>

California law appears unsettled as to the precise balance between Education Code Section 35160, providing that the "governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with, or preempted by, any law . . . " and Education Code Section 46300, providing for ADA computation based on "the attendance of pupils while engaged in educational activities." Under existing constitutional provisions, the Legislature has the discretion to enact legislation either to prohibit or to regulate electronic commercial advertising in the classroom. Until the Legislature does so in a manner which limits the Department's discretion, the Department appears to have discretion to regulate within this area.

### **California's Channel One litigation**

Channel One litigation in California is outlined above, under the heading "This Request for Determination: Background."

One key legal issue has been whether the commercials were merely "incidental" to the entire otherwise educational activity, or whether their presence somehow fundamentally alters the character of the viewing activity. As the decisions

from other jurisdictions (see next part of this determination) show, different authorities can answer this question differently, though the trend seems to be in the direction of permissiveness and local rather than state-level determination.<sup>113</sup> Several years after the Channel One Advisory was issued, the California courts resolved the question of whether Channel One commercials were to be deemed "incidental." This ultimate California resolution--allowing showing of Channel One--was consistent with the earlier national trend toward permissiveness and local control. After summarizing the conclusions of the California Court of Appeal in 1994, we will proceed with our analysis of the state of law as of 1989. We will proceed because we still need to answer the question of whether or not the Channel One Advisory constituted the only legally tenable interpretation of duly adopted California law as of the 1989 issue date of the Advisory. In the final analysis, the *Dawson* case supports our conclusion that the policy reflected in the Channel One advisory was not the only legally tenable interpretation of governing law.

In *Dawson v. East Side Union High School District*, the Court ruled (1) that in California local school districts are granted substantial discretionary control of public education, and (2) that in the exercise of this discretion the school districts have some latitude to adopt or permit uses or procedures which in and of themselves are not strictly educational so long as the uses or procedures are no more than incidental to valid educational purposes.<sup>114</sup> The Court continued:

" . . . as an abstract proposition, a California public school district may lawfully expose its students to matters, not otherwise expressly proscribed, which may reasonably be characterized as incidental to a valid educational purpose.

"Under the principles of *local control* to which we have referred, the essentially factual question whether the particular noncurricular matters are or are not incidental must be addressed in the first instance to the broad discretion of local school districts and boards, and a court would be justified in disturbing the local decision only upon a clear showing of an abuse of the local district's or board's sound discretion." (Emphasis in original.)<sup>115</sup>

### **Development of Law regarding Channel One in Other Jurisdictions**

California's highest court has not yet considered Channel One or the propriety of imposing electronic commercial viewing on public schoolchildren. However, at least one state Supreme Court and the Attorneys General of several other states have rendered opinions on some of the same issues that the former Superintendent of Public Instruction addressed in his 1989 Legal Advisory.

The only state Supreme Court to have considered the issue to date is North Carolina's, in *State of North Carolina, et al. v. Whittle Communications, et al.* ("*State v. Whittle*").<sup>116</sup> The North Carolina Supreme Court concluded that:

- (1) the contract under which a private company supplied public schools with a news program including commercial advertising did not violate a state constitutional provision that the power of taxation shall be for public purposes only;<sup>117</sup>
- (2) the contract did not violate the state constitutional guarantee of a general and uniform system of free schools;<sup>118</sup> and
- (3) the contract did not violate public policy, as North Carolina's Legislature has given local school boards the authority to enter into contracts for instructional materials which involve advertising without seeking the approval of the State Board of Education.<sup>119</sup>

While the precise laws and procedures of North Carolina differ from those in California, the Court's conclusion is plausible, even under our differing statutes and case law.<sup>120</sup>

A partially reported federal case rejected a Tennessee parent's claim that using Channel One in his child's classroom violated the Establishment Clause of the U. S. Constitution.<sup>121</sup>

The Attorney Generals of at least four states have expressed opinions about the propriety of using Channel One in public schools in light of each state's Constitution, statutes, and other governing law. In 1990, the Attorney General in Arizona,<sup>122</sup> Kentucky,<sup>123</sup> and Louisiana<sup>124</sup> each found that broadcasting Channel One in public schools was or would be acceptable, conditioned on approval by either the local or state school board, depending on each state's laws. In 1992, the Utah Attorney General issued a lengthy and carefully balanced opinion, taking into account both *State v. Whittle, supra*, and developments in California up until the time the opinion was issued.<sup>125</sup>

The Utah advisory opinion concluded that a school district may make Channel One available on a voluntary basis, as long as the local school board has ratified the decision, and as long as

*"the Channel One program is not substituted during class time for regular coursework for which credit is given and attendance is required."*  
(Emphasis added.)

In other developments, the New Jersey "State Education Commissioner ruled . . . that about 300 New Jersey schools can continue showing Channel One, a classroom television program that mixes news and commercials. The Commissioner [. . .] rejected a contention by an administrative law judge that the broadcasts, produced by Whittle Communications, violate state law."<sup>126</sup> In Rhode Island, after an initial attempt to ban Channel One, the Rhode Island Legislature voted in July 1992 to permit its use in public schools.<sup>127</sup>

In fact, recent news articles quote Whittle officials as claiming that 47 states air Channel One in at least some of their classrooms.<sup>128</sup>

The most noteworthy aspect of this array of state judicial decisions, advisory opinions, and administrative actions is that thoughtful courts, attorneys general, scholars, education commissioners, and policymakers disagree as to the legality and propriety of showing Channel One with its commercials in public school classrooms. Many states share a similar free school guarantee, but that clause does not mandate one indisputable answer as to the propriety of including minutes spent viewing commercials in the regular school day. Nor do the governance provisions and state-local school board relationships peculiar to each jurisdiction dictate a uniform result.<sup>129</sup>

### **Conclusion regarding Channel One Advisory**

The following portion of the challenged Channel One legal advisory is a "regulation" as the key provision of Government Code Section 11342, subdivision (b), defines "regulation:"

The State Department of Education pronouncement that it will not accept certifications as to days and minutes of instruction from school districts and county offices of education to the extent that they include time spent by pupils watching commercials which are part of "Channel One" or similar television programs.

### **(2) Fiscal Management Advisory 89-04, the **Work Permit Advisory**:**

The challenged Fiscal Management Advisory regarding local work permit policies and newly revised work permit forms applies to all county and district superintendents, the addressees of the advisory. The Advisory is clearly a document intended to have general application. The following discussion will analyze whether the contents of the Advisory are "standards" which the Department imposes (or is attempting to impose) on the school districts, or

merely "advisories"--i.e., *not* rules or standards intended to have general application--as the document's title suggests.

Does the Advisory implement, interpret or make specific the law which the Department administers? Yes, in part. The Advisory interprets and implements Education Code Sections 49100 through 49183, regarding the employment of minors.<sup>130</sup> In its response, the Department notes that the Advisory itself concludes by stating: "This Fiscal Management Advisory provides *guidelines regarding work permits* that are exemplary only; compliance with these guidelines is not mandatory." (Emphasis added.) This statement applies to some of the exhortations in the Advisory, but other provisions appear mandatory in spite of this disclaimer language. As the Requester notes, "[T]he cover memorandum dated October 16, 1989, from the Superintendent, makes clear that despite the disclaimer on page 6, the Department intends to audit districts' work permit files *to test the appropriateness of the justifications* that are provided for those students who work in excess of twenty hours'.[sic]" (Emphasis added.)

The Advisory contains three parts: The first part strongly recommends that authorities who issue work permits should "exercise their discretion to approve outside employment only to the extent it does not significantly interfere with students' school work," specifically suggesting a 20-hour-per-week limit on student work hours. Secondly, the Advisory continues: "This Advisory also includes sources of further information on child labor laws and a discussion of the often misunderstood restrictions on employment of minors in 'motor vehicle occupations.'" Third, the fourth paragraph of the Advisory begins:

"Finally, this Advisory provides an orientation to the newly revised and available Form B-1 ('Request for Work Permit and Statement of Intent to Employ') and Form B1-4 ('Permit to Employ and Work')."

The first section most clearly consists of "guidelines regarding work permits." It discusses the "effect of student employment of [sic] performance in school," summarizes the rationale for limiting students' work hours to no more than 20 per week during school time, except under special circumstances, and cites supporting research. The Department then discusses "local responsibility to limit work permits," citing the legal authority school officials have to deny or revoke work permits if a student's "education is being harmed." Education Code Section 49164 states:

"A permit to work shall be revoked by the issuing authority when he [sic] is satisfied that the employment of the minor is impairing the health or education of the minor . . . ."

The Department expands on this provision, stating that

"[i]mplicitly, a work permit for a number of hours of employment that would interfere with school work should not be granted in the first place, and if granted must be reviewed periodically to determine if the student's education is being harmed."

In the first phrase, the Department appears simply to make explicit the implicit meaning of the statute.<sup>131</sup> However, the second requirement--requiring the issuer *periodically* to review the work permit--is not a "guideline" about work permits so much as the Department's directive to the local authorities to follow a specific procedure. The statute requiring permits "always [to] be open to inspection" certainly provides a basis for a periodic inspection requirement, while not mandating any particular frequency or interval for inspections or reviews.

The Department also states that

"[l]ocal policies *should* both limit work permits to not more than 20 hours total per week, with the possibility of exceptions in special circumstances, and require maintenance of satisfactory grades prior to and following issuance of work permits. . . . [A] brief statement of the special circumstances justifying the permit *should* be entered in the 'Remarks' space . . . ." (Emphasis added.)

And the Department continues:

"I intend to have Department staff periodically review work permit files as part of routine site visits to see that appropriate justifications are being provided when circumstances warrant . . . . "

The first two points use the persuasive form "should," which *might* mean "should" as a recommendation, albeit a strong recommendation, rather than as a variation of "shall" (which term is, without question, regulatory). However, the last statement--that Department officials *will* inspect the work permits themselves to see if they contain the appropriate justifications--is *not* merely a "recommendation."

The second portion, entitled "Sources of further information," states that "[a]ll school personnel involved in issuance of work permits *should* have readily available for their reference two publications . . . ." (Emphasis added.)

Although the language is forceful, there is no further warning that the Department will inspect for the presence or absence of the publications; in fact,

the remainder of the paragraph describes the virtues of the publications and how to obtain them without cost. In a portion entitled "Laws restricting employment of minors in 'motor vehicle occupations,'" this section briefly paraphrases state and federal law regarding minors operating motor vehicles on the job without further interpreting or implementing these laws.

The last segment discusses both revised forms, Form B-1 ("Request for Work Permit and Statement of Intent to Employ") and Form B1-4 ("Permit to Employ and Work"), noting that these sections "should be read in conjunction with the enclosed copies of the new forms" which were attached to the Advisory submitted to OAL. The Advisory describes minor changes including format changes such as using carbonless copies. Next is the section headed "Changes in the information on the reverse side of the form." Although the Requester did not provide OAL with the reverse side of the forms, the Advisory itself explains that "the information has been rewritten to clarify the hours of work and spread of hours for various age groups under both state and federal law, on school days and non-school days." This portion interprets various laws which the Department itself is not directly responsible for administering, although the Department does note that the earlier version of the Forms contained misleading information and corrects it. The Department also reiterates its "strong" recommendation against allowing children to work more than 20 hours per week. In contrast, the Department interprets the law as *allowing* up to 36 hours in an example.

The next section, "Changes in the Form B1-1," describes the reorganized "Request for Work Permit and Statement of Intent to Employ Minor" and the clarifying changes. The Department is proceeding under Education Code Sections 49162 and 49163. Section 49162 requires the Department to prescribe the necessary form for notification of intent to employ a minor.<sup>132</sup> Section 49163 sets out the required contents of the notification.<sup>133</sup> The Advisory notes that the reorganized form contains three blocks--one for the applicant to complete, one for the school, and one for the employer. Section 49163 requires most of the same information sought in the applicant and employer blocks. The applicant portion of the Form requests the minor's date of birth and proof of age, while omitting the minor's signature. The Form B1-1 requires additional information from the employer: the wage, the employer's workers' compensation carrier, and the supervisor's signature [rather than the "*employer's*" as listed in Section 49163(e)]. The form also requests the school name and address, although the statute does not.

The final page of the Advisory discusses "Changes in the Form B1-4," the work permit itself (actually titled "Permit to Employ and Work"). Education Code Section 49117 requires the Superintendent of Public Instruction to issue

"[a]ll permits to work or to employ [and] all certificates of age . . . pursuant to this chapter."<sup>134</sup> Section 49115 spells out the required contents.<sup>135</sup> The Form B1-4 requires all of the items listed in Section 49115. It also expands the requirement of subdivision (b), which is limited to permits issued "for outside of school hours," to an unqualified request for school name, address and phone, although the "Hours of compulsory school attendance" question is qualified as "required for 'regular' employees only."

The Permit also contains a two-line area labeled "Remarks." The Advisory explains "If a student has a particularly complex or irregular schedule, it can be set out in the 'Remarks' space." (The Advisory does not specify whether the schedule is the school or work schedule). In addition, in the "Local responsibility" section, the Department states: "On those occasions when permits *are* issued for more than 20 hours, a brief statement of the special circumstances justifying the permit should be entered in the 'Remarks' space, so that employers and others are on notice that such longer hours are not routinely authorized." (Emphasis in original.) Both these provisions use suggestive rather than command forms: an irregular schedule "can" be set out and a brief justifying statement "should" be entered in the "Remarks" space. We conclude that, under the circumstances presented here, these provisions are not "regulatory."

It is noteworthy that the Education Code (Sections 49117 and 49162) mandates the Department to issue forms and, by implication, the local school districts to use the Department-issued form--unless, under Section 49117, the Department authorizes a district to create its own work permit.

### **Conclusion regarding Work Permit Advisory**

Are the work permit provisions of the Advisory, including the attached forms, merely recommendations? Although some provisions simply make recommendations, the following provisions of the Advisory and the Forms are "regulations" which the agency must adopt in accordance with the requirements and procedures of the APA.

1. The requirement for the district's periodic review of student records supporting the work permit;
2. The requirement for periodic review by Department staff;
3. Provisions in the Form B1-1 requiring additional information from the employer, such as wages and the employer's workers' compensation carrier, and the requirement for the supervisor's signature;

4. Provisions in the Form B1-1 and Form B1-4, the work permit, requiring school information without the qualification of Section 49115, subdivision (b).

The remaining provisions of the Advisory and the Forms either make recommendations and are "advisory," in the sense suggested by the title, or they restate the applicable law.

(3) Program Advisory 89/9-2, the first Supplemental Grants Advisory:

**SUPPLEMENTAL GRANTS ADVISORIES**

**Background of the Supplemental Grants Advisories**

California voters adopted "The Classroom Instructional Improvement and Accountability Act," also known as "Proposition 98," on November 8, 1988. Proposition 98 established a constitutionally guaranteed minimum level of state funding for school districts, community college districts, and state agencies providing direct elementary and secondary level instructional services. In response, the Legislature enacted laws designed " . . . to implement the minimum public education funding level requirements of the Classroom Instructional Improvement and Accountability Act, . . . [and to recalculate] public school apportionments . . . on or before June 30, 1989."<sup>136</sup>

Among other provisions, this legislation established a Supplemental Grants Program for school districts which receive less than average funding from state programs so that all California children may have equal educational opportunities.<sup>137</sup> On October 12, 1989, the Department of Education issued the first of the challenged Program Advisories regarding the Supplemental Grants Program. On November 6, 1989, the Department issued a second advisory to dispel what it characterized as a misinterpretation of the Supplemental Grants Program.

**Do the Supplemental Grant Advisories contain standards or rules of general application?**

The Department addressed both Program Advisories, 89/9-2 and 89/9-5, to "County and District Superintendents." The Department clearly intends these Advisories regarding Supplemental Grants to apply generally to all schools and school districts affected by the Supplemental Grants Program created by the legislation implementing Proposition 98. The first Advisory states that its purpose is "to provide programmatic intent and resource allocation information about the Supplemental Grants Program . . . ." <sup>138</sup> The second Advisory's

purpose " . . . is to clarify the Department's administration of the Supplemental Grants Program and, in particular, its understanding regarding the supplementary use of these funds."<sup>139</sup> Insofar as the Advisories contain standards, the Department clearly intends that the standards apply generally.

The first five-page Advisory lists approximately 14 rules, requirements, and standards of general application. The second Advisory is only two pages long and contains four main points. As discussed above, the critical issue in determining the "regulatory" nature of material in an Advisory or other state agency document is whether it simply *restates* the applicable law or whether it *adds to or embellishes* it in any manner. We will review the first Supplemental Advisory, section by section. Since the second Advisory expands on the "Specific Requirements" section of the first, we will discuss the second in conjunction with the "Specific Requirements."

### **Advisory 89/9-2:**

#### **1. GENERAL PURPOSE OF SUPPLEMENTAL GRANTS<sup>140</sup>**

The Advisory first states that districts will qualify for supplemental grants "if their per pupil average of general revenue and certain categorical funds is less than the average for districts of a similar type and size."<sup>141</sup> This paragraph simply restates the Supplemental Grants provisions of the Education Code.<sup>142</sup> This first paragraph then provides that a district *may* use its funding for the general purposes of any one of 27 designated programs, restating the applicable Education Code Sections.<sup>143</sup> The Department has interpreted the statute further to the extent that it inserted the term "general purposes" into the program.<sup>144</sup>

The second paragraph provides that "[d]istricts are *encouraged* to use these supplemental resources to fund program improvements." (Emphasis added.) The Department then lists examples of activities and "other valuable investments." These examples are clearly only persuasive suggestions, neither mandating nor limiting a district's choice of activities under the statute.

The third paragraph generalizes about the program, encouraging the districts to plan systematically (i.e., districts "*should* select . . . programs whose general purposes are supportive of the focus of their goals;" "[l]egislative statements of intent *suggest* that these grants will be available . . . ;" and " . . . districts *should* keep in mind . . . " (Emphases added.) The final sentence--that "[u]nspent funds may be carried over to the next fiscal year"--reflects the usual terms of the districts' duties with respect to these grants from the state, absent any other legislation affecting their expenditures.<sup>145</sup> Thus, unless there is a hidden meaning, the Department does not appear to be embellishing upon the

otherwise applicable scheme.

The Department then describes the addition of the 27th program to those the statute originally enumerated, simply restating the programs for which districts may use Supplemental Grants funds.<sup>146</sup>

Finally, the last paragraph of the General Purposes section states that the Supplemental Grants "will be monitored through the financial audit process." This sentence neither creates nor amends the financial audit process, which may or may not be regulatory or already in regulation. Whatever the status of the audit process, this Advisory does not alter it. The rest of the paragraph explains that the Supplemental Grants "will *not* trigger" certain types of reviews, although districts "*may choose* to have their schools participate . . . ." (Emphases added). These provisions do not require the districts to do or refrain from doing anything, nor do they establish a standard of general application. Instead, they describe an option which districts may choose if they so wish.

## 2. DETERMINATION OF GRANT AMOUNTS AND ALLOCATION PROCESS<sup>147</sup>

The first paragraph restates the methodology for calculating the grant amounts as set out in Education Code Section 54761, subdivision (a). It also restates which programs are excluded.<sup>148</sup> It does not interpret, implement, or make specific the statute but rather paraphrases it.

The next paragraph describes how to calculate the amount of categorical income received when districts operate one or more of the categorical programs under a Joint Powers Agreement with other districts. The statutes do not detail the particular method required under these circumstances. The Department suggests that

"Those districts [described above] *should equitably prorate* the categorical income received for the purpose of determining Supplemental Grants eligibility. Proration among districts *should be based upon* the constructive benefit received by each . . . and *should be agreed upon* by all parties." (Emphasis added.)

This portion seems to advise strongly the Department's preferred manner for districts to handle the situation in which more than one district jointly receives categorical funds. It seems to assure that, at a minimum, the Department will accept this approach. The Department uses the word "should," however, which could mean that the Department *requires* proration as defined, or it could mean

that the it strongly *encourages* this methodology. One advantage of the rulemaking process is that it requires an agency to make clear whether it *requires* a particular action (often accomplished by using the word "shall") or whether it merely *recommends* it. Many agencies use the term "should" as suggestive or permissive rather than mandatory, but the word's meaning may vary depending on an agency's own definition or statement of intent, or the context (see discussion at note 154). Although the quoted language stops short of *clearly* requiring the single approach mentioned, as shown in part by the reference to the agreement by all parties, the context suggests the Department's intent is to *require* this approach. The instructions continue:

"In order to compute Supplemental Grants for those districts . . . , *it will be necessary* for the district receiving the specified categorical income to inform the Local Assistance Bureau of the agreement to distribute such income among participating districts." (Emphasis added.)

This sentence does set out a requirement--"it will be necessary"--but it is hard to imagine how the districts involved could proceed in their application for funds other than by informing the Local Assistance Bureau of how they agree to apportion the categorical income used to calculate eligibility for the Supplemental Grants Program. This sentence alone does not prescribe a particular manner of apportioning the categorical income, but only requires that the districts inform the Bureau of *how* they have agreed to apportion it. Finally, the paragraph concludes:

"Notification *should be made* by letter signed by an authorized representative of each participating district." (Emphasis added.)

Once more, the Department is strongly encouraging this approach, without ruling out other means of accomplishing the same purpose: a reliable means of knowing what the districts have agreed among themselves. If the Department were to "issue, utilize, enforce, or attempt to enforce" this notification method rather than simply try to persuade districts to use this preferred means, then it would be imposing a regulation which has not undergone the APA procedures. However, literally, this sentence apparently *encourages* rather than *requires* districts to use a letter of notification.

Likewise, the Department's actual behavior as to what it accepts as an "authorized representative's" signature will determine whether it is issuing or enforcing an "underground rule," or whether it is simply providing one example of a way in which districts might conduct their business so that the Department can rely on the documents they submit. The material submitted does not indicate whether the Department intends "authorized representative" to have a

specialized meaning, such as having on file specific authorization documents. Assuming that it indicates only the Department's preference for a reliable means of conducting business, it is not rule or regulation imposing a standard of general application. (If it *does* refer to a particular procedure or method, then it is an unadopted "regulation," unless a statute or duly adopted regulation contains that procedure and requirement.)

The third paragraph in the Methodology section restates the requirements regarding apportionment, deposit, and expenditure of Supplemental Grants funds.<sup>149</sup> The fourth paragraph explains the procedure for the second principal apportionment.<sup>150</sup> The rest of the paragraph cautions districts that the worksheets use estimates, and that small districts especially may vary in their relation to the averages, once more accurate information is known. This warning is not a rule or regulation.

The final paragraph restates the law regarding proportionate reduction if sufficient funds are not available to fund all districts at the full amount based on the statutory formula.<sup>151</sup> The Department's estimate that funds are available to provide 96% of the amounts calculated is not a rule but a piece of helpful information--about which it has already cautioned the districts.

### 3. SPECIFIC REQUIREMENTS<sup>152</sup>

These "specific requirements" are the heart of the Advisory and, in conjunction with the statutes themselves, most directly affect how districts will use any Supplemental Grants funds they receive.<sup>153</sup> The Advisory section begins by stating that

*"It is the Department's view that the Supplemental Grants Program gives districts great latitude in the use of the funds, and that many of the specific requirements of the listed categorical programs do not apply to Supplemental Grant funds." (Emphasis added.)*

In this vein, the Department supplies examples of uses of funds for the general purpose(s) of particular categorical programs, without being limited to the programmatic strictures of some of the programs. The next paragraph continues

*"Supplemental Grants should be used to improve and expand existing categorical program activities or carry out new activities related to the general purposes of the categorical programs listed . . . and should not be considered an additional source of general revenue. Therefore, Supplemental Grant funds should not be used to replace local non-*

categorical funds that would have been available for a categorical program in the absence of the Supplemental Grant." (Emphasis added.)

In the first clause, the Department seems merely to encourage the districts to use the funds in the recommended way (using the word "should" as the *persuasive* form, in its common meaning, rather than "shall," which is clearly "regulatory").<sup>154</sup> The passive construction renders the second clause somewhat ambiguous. The Department may intend to prohibit districts from considering the funds as an "additional source of revenue" or, by using the term "*should* not," it may simply be recommending strongly that districts not consider the funds as "additional." These words could be persuasive as easily as directive, and, in context, appear to be suggestions or recommendations rather than "regulations." Had the Department ended its advice with this language, this part of the Advisory would remain non-"regulatory," simply restating the law rather than the Department's issuing or attempting to enforce any additional guidelines. However, the final sentence of the first paragraph provides:

"In general, this means that local funds currently dedicated to program improvement efforts *may not be reduced* simply because new money for program improvement is now available. The point is to build and not simply redistribute." (Emphasis added.)

Here, the Department has unequivocally prohibited districts from reducing funds currently dedicated to categorical programs. The Advisory then describes factors used to determine whether previously available money is still "available," based on pre-existing plans or commitments which would have diverted the unrestricted funds away from the categorical programs whether or not additional supplemental funds had become available for the categorical programs.

#### **Advisory 89/9-5**

We will turn to the second Supplemental Grants Advisory at this point, since it further explains what the Department meant as far as restricting the use of other, non-Supplemental Grants funds. First, the Department reiterates that the funds are "not to be considered general revenue."<sup>150</sup> The pivotal statement is:

"By identifying these 27 programs, the Legislature expressed its intent that Supplemental Grants funds be spent in support of one or more of them--*not* for general fund purposes. This is the prohibition on supplanting which has been overlooked."

In the second paragraph, the Department restates its earlier interpretation that

districts may use the funds for the "general intent" of the 27 programs, without following their specific rules and regulations; that they may not use the funds to support other programs; but that they may establish one or more of the categorical programs permitted but not yet operating in their district.

The third paragraph clearly *prohibits* districts from "convert[ing] Supplemental Grant funds to General funds [sic] indirectly by replacing funds currently dedicated to one or more of the 27 identified programs with Supplemental Grant funds." The Department then repeats the one sentence which is more than a [very strong] recommendation from the first Advisory: " . . . local funds currently dedicated to program improvement efforts may not be reduced simply because new money for program improvement is now available."<sup>151</sup>

In its efforts to avoid circumventing the supplemental nature of the program, the Department's logic is compelling. However, the critical question is whether it could have interpreted the statutes in any other way. The Attorney General has shed some light on a closely related question.

In response to a request from a Member of the Legislature, the Attorney General of California determined that Education Code Sections 54760 and 54761 do *not* require school districts to maintain their previous levels of unrestricted funding when they use supplemental grant funds for one or more of the enumerated categorical programs.<sup>152</sup> The Attorney General further concluded that the Department of Education lacks the authority to require school districts to maintain their previous levels of unrestricted funding for categorical programs as a condition of receiving supplemental grant funds<sup>153</sup> In fact, the Attorney General found that the Department's Program Advisory of November 6, 1989, (the second "Supplemental Grants Advisory") exceeded the scope of the Department's authority.

The question before us is narrower. The Department has enunciated its interpretation of the statutes controlling the Supplemental Grants Program. We must first determine whether Education Code Sections 54760 and 54761 have only one legally tenable interpretation, and secondly, whether the Department expressed only that interpretation in its Advisories on Supplemental Grants.

As the Attorney General notes, in construing a statute, one must first look at the "words of the statutes themselves, giving to the language its usual, ordinary import."<sup>154</sup> Neither the intent language of Section 54760 nor the provision of Section 54761, subdivision (e), restricting the use of Supplemental Grants funding to the enumerated programs indicates any restriction on previously-used otherwise unrestricted funds.<sup>155</sup> Nor do they indicate a restraint on any other authority the Department may have to interpret the statutes by regulation.<sup>156</sup>

The Attorney General's opinion that the Advisory expresses an interpretation completely inconsistent with the statute is, at the least, persuasive authority that the statute is open to more than one reasonable interpretation. The opinion also suggests that if the Department were to adopt regulations governing the relation between school districts' use of unrestricted funding and Supplemental Grant funds, it should craft those regulations very carefully, taking into account other provisions of law governing the use of unrestricted funds.<sup>157</sup>

The crux of the issue is that the Legislature did *not* specify that these Supplemental Grants funds were to be used only to supplement and not to supplant unrestricted funds previously used for categorical programs. The California Legislature knows how to express this prohibition when it so desires.<sup>158</sup> It is somewhat persuasive that the Legislature chose to name its program the "Supplemental Grants Program." However, it did *not* use language requiring that these funds supplement and not supplant funds already used for categorical programs. Therefore, at least one other interpretation is equally reasonable: that the Legislature wanted to ensure that the categorical programs received funding even when other, non-restricted, funds were transferred to other, non-categorical programs. Or, one could accept the Attorney General's interpretation: that the statutory language does not even permit an exclusive interpretation that restricts the use of other funds not mentioned in Article 9 (Sections 54760 and 54761).

At a minimum, it is clear that there is more than one legally tenable interpretation of the Supplemental Grants statutes. Under these circumstances, the Department must proceed by adopting regulations if it cannot rely on the details in the statutes themselves.

The second Supplemental Grants Advisory contains one last provision establishing a standard of general application: it requires that districts must "sign an assurance that all Supplemental Grant funds were expended to supplement current expenditures for one or more of the 27 programs and were *not* used to supplant the general fund expenditures." (Emphasis in original.)<sup>159</sup> This requirement clearly implements and makes specific the Department's preferred interpretation of Section 54761.

### **Advisory 89/9-2**

Returning to the final paragraph of the Specific Requirements, the Department assures districts that their use of Supplemental Grants funds for particular categorical programs will not prejudice their eligibility for future funding for those programs. This statement seems a straightforward inference from the legislative intent of the Supplemental Grants Program. The statute also seems

to require the Department to determine each district's eligibility each year.

#### **4. FISCAL REQUIREMENTS FOR SUPPLEMENTAL GRANT FUNDS**

This section defines the category for reporting Supplemental Grant transactions, specifying the form and revenue code. It also states the rule for allocating indirect costs, requires a year-end financial report, and specifies its format and contents. These detailed requirements implement and make specific the statutes creating the Supplemental Grants Program.<sup>160</sup>

Finally, the Department refers to a State Controller's publication which is outside the scope of this determination.

#### **5. ADVISORY STATEMENT**

The Advisory concludes:

"This advisory contains information regarding Supplemental Grants that is *advisory* only. For any interpretation of the law itself, you may wish to consult your legal counsel." (Emphasis in original.)

As we have noted before, this disclaimer cannot counteract the effect of the document's contents. If the contents are not regulatory, i.e., do not contain "regulations," they will remain non-regulatory regardless of any disclaimer. And if a state agency is implementing, interpreting, or making specific the very statutes it administers, then no disclaimer, no matter how vehement, how artfully drafted, or how frequently reiterated, can alter the legal conclusion that the agency has attempted to promulgate a rule or standard of general application which should have undergone the APA rulemaking procedure (unless otherwise exempt).<sup>161</sup>

Education Code Section 33308.5 does not change this basic legal tenet.

#### **Conclusion regarding Supplemental Grants Advisories**

In conclusion, the Supplemental Grants Advisories contain suggestions and recommendations, restate the applicable law, and also contain the following "regulations:"

1. Restricting use of Supplemental Grants funds to the *general purposes* or *general intent* of the categorical programs;
2. Requiring equitable proration and a specified authorized representative

letter for Joint Powers Agreement districts;

3. Prohibiting districts from reallocating the prior-year funds used for categorical programs to other programs;
4. Requiring districts to sign an assurance that they have not reallocated prior-year funds to other programs now that Supplemental Grant funds are available;
5. Imposing any fiscal requirements on the Supplemental Grants funds that are not already imposed on all appropriations by statute or duly adopted regulation.

None of the established exceptions to the APA apply to these provisions. The statutes contain no explicit exceptions for these rules. The Department may argue that the internal management exception should apply, but as detailed below, that exception applies only to actions *within* a state agency. The Advisories under review apply to local school districts and superintendents. While they may be "housekeeping" in a colloquial sense, that informal characterization cannot exempt the Department's requirements from the otherwise applicable requirements of the APA.

(4) Program Advisory 87/8-2, the Categorical Funding Sunset Advisory:

## SUNSET ARGUMENT

Five long-standing "categorical" education programs ended on June 30, 1987, pursuant to "sunset" legislation.<sup>162</sup> The Department issued this "Sunset Advisory" to guide the school districts in carrying out their responsibilities in this unusual situation: the "specific categorical programs cease[d] to be operative and [specified] Sections . . . govern[ed] program funding" but *funding* did *not* cease as of the sunset date.

**Does the Sunset Advisory contain standards or rules intended to have general application?** Program Advisory 87/8-2 is addressed to "County and District Superintendents [¶] Attention: Consolidated Programs Directors and Directors of Indian Early Childhood Education Programs." The Department clearly intends this Advisory regarding "Five Education Programs Which Have Sunset" to apply generally to every program, school, and school district affected by the "sunsetting" of the programs the Advisory discusses.

Overall, the Advisory is generally a collection of standards or general rules.

As discussed in detail above, the critical issue in determining whether or not material in an Advisory such as this one is "regulatory" is whether (1) it merely *restates* the applicable law or (2) it *adds to* or *embellishes* it.

The Advisory lists "eight general considerations which the Department believes are important to the continuing operation of the five programs."<sup>163</sup> The Advisory next addresses 23 "hypothetical" questions to illustrate how local school districts and schools are to handle the sunseting of certain program provisions. We will follow the Advisory's format in discussing the sunset issues and whether the contents of the Advisory are "regulatory."

1. "Flow of funds to Each Program Does Not Change"<sup>164</sup>

The Department cites Education Code Section 62002, which maintains that the funds will continue to be disbursed "according to the *identification criteria* and *allocation formulas* . . . in effect on the date the program shall cease to be operative . . . ." (Emphasis supplied by Department.) Clearly, this section does no more than restate the applicable law.

2. "Funds Must Be Used for the 'General Purpose' of Programs"<sup>165</sup>

This section restates Education Code Section 62002. The Advisory reminds school districts and program administrators that the statute requires funds to be used "for the general [. . . or] intended purposes" of the program, but eliminates "all relevant statutes and regulations adopted . . . regarding the use of the funds." The sunset provisions, the Department points out, give local schools and districts some additional discretion, but their programs must still follow the statutory general or intended purposes of each sunsetted programs. This portion of the Advisory has not enlarged upon or embellished the terms of the statute.

3. "Parent Advisory Committees and School Site Councils Continue"<sup>166</sup>

After repeating Education Code Section 62002.5, this section adds that "this statute requires all *presently operating* parent advisory committees and school site councils to continue to operate *with the same composition* required prior to June 30, 1987."<sup>167</sup> (Emphasis added.) This statement goes beyond the statute in several ways: it requires all *presently operating parent advisory committees and school site councils* to continue operating; it requires these committees and councils to retain the same *composition*; and it requires them to do so consistent with what they did *prior to June 30, 1987*, the sunset date.

By contrast, the statute requires those committees and councils "*which are in*

*existence pursuant to statutes or regulations as of January 1, 1979, [to] continue . . . ,*" not those in existence as of June 30, 1987. The statute continues:

"The *functions and responsibilities* of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979." (Emphasis added.)

The committee's or council's "functions and responsibilities" do not necessarily include their "composition." Unless a statute or regulation equating these characteristics exists, these additional interpretations do more than restate the statute. Thus, they are "regulatory."

#### 4. "Audits and Compliance Reviews Are Required"<sup>168</sup>

This section restates the law regarding audits and compliance reviews in keeping with Education Code Sections 62002, 62003, and 62005, as mandated by Section 62000.<sup>169</sup> The Requester observes that

"The 'advice' also makes it clear, at pages 3-4, that the interpretation set out in the program advisory will form the basis for compliance audits by the Department."<sup>170</sup>

The provisions of the audits section do not go beyond the statute in any way, except possibly by referring to the "Consolidated Programs Section of the Coordinated Compliance Review Manual." This Manual is not the subject of the request for determination, however, and no party provided it for our review. Therefore, we express no opinion as to whether any of its provisions are "regulatory."

#### 5. "Program Quality Reviews and School Plans Continue"<sup>171</sup>

The Department notes that the sunset provisions do not affect Education Code Section 64001, which establishes the "requirement for program quality reviews and continues the requirement for school plans for schools receiving Consolidated Programs Funds." The Department states that its

"procedures and documents used to comply with Section 64001 will continue to be operative."

Again, no party asked to make these "procedures and documents" part of the request for determination. Therefore, we can express no opinion as to whether they are procedures which are "regulatory" in character, whether properly

adopted or not, or whether they consist of material which is not "regulatory." Whichever they are, this Advisory does not change their status.

6. "Use of Staff Development Days and the School-Based Coordinated Program Option"<sup>172</sup>

This section points out an alternative option, under the School-Based Program Coordination Act, to replace staff development days lost because the SI Program has sunset. This section does not interpret or embellish upon the applicable statutes.<sup>173</sup>

7. "Waivers of the Education Code"<sup>174</sup>

This section simply restates the statutory provision that still allows waivers of the Education Code under certain circumstances, although the more specific waiver authority in the sunsetted programs has expired.<sup>175</sup>

8. "Future Legislation May Affect Programs Which Have Sunset"<sup>176</sup>

This section cautions school districts that they "should remember" there may be legislative efforts to reinstate the sunsetted programs, and to keep this possibility in mind as they decide how extensively to change their programs.<sup>177</sup> This provision, stating that districts "should remember" such efforts, appears to exemplify a statement using the form "should" in a non-"regulatory" sense.

Having summarized the eight "considerations," the Department next "attempt[s] to answer some of the most frequently asked questions about the impact of Sections 62000-62007 on the use of funds for those programs."<sup>178</sup>

"I. MILLER-UNRUH BASIC READING ACT of 1965:"<sup>179</sup>

This section contains three questions and answers regarding the reading program. The first defines the "general purpose" of Miller-Unruh funds by referring to the legislative intent,<sup>180</sup> consistent with Education Code Section 62002. Secondly, the Department sets out what is required of schools "now that the legislation has expired."<sup>181</sup> This section reconciles as far as possible the statutes requiring certified reading specialists (which persist) with the expiration of the provisions establishing the Miller-Unruh Reading Specialist Certificate. The Commission on Teacher Credentialing, not a party to this determination, is responsible for credential requirements. The Department notes that it has recommended to the Commission that it adopt regulations "for the acceptance of the former Miller-Unruh Reading Specialist Certificate as fulfilling the minimum requirements for a reading specialist credential under Section 62002

and former Section 54101."<sup>182</sup> The recommendation appears wise in that, without a regulation (or a statutory change), the Commission may not have the power to accept the Certificate.

The final paragraph of Answer 2 provides that

" . . . districts receiving Miller-Unruh funds are required to 'cofund,' with general funds, each reading position for which partial Miller-Unruh monies are received. . . . Districts cannot aggregate Miller-Unruh funds and fill less than the specified number of Miller-Unruh positions because the cofunding requirement is a part of the allocation funding process preserved by Section 62002. [Citations omitted.]"<sup>183</sup>

This statement reflects the law that, following the sunset, funds will be disbursed following the allocation formulas for the program in effect when the program sunset. Not having been provided with all the material that sets the allocation formula in effect at the time the sunset took place, we cannot say whether that material is regulatory, statutory, exempt from the APA, or non-regulatory. Whatever its character, the restatement of the legal requirement in Question and Answer 2 is not in itself a "regulatory" interpretation of the law. That is, the program's sunseting has not discontinued whatever the allocation calculations and requirements were before the sunset.

Question 3 asks: "What is *not* required now that the legislation has expired?" The Department then lists four major program components, distinguishing the specific requirements which have expired from the general purpose requirement which still remains effective. Once more, the Department is simply restating the legal impact of the sunset provision.

## "II. SCHOOL IMPROVEMENT (SI) PROGRAM"<sup>184</sup>

First, the Department recites part of the legislative intent provision to show the program's general purpose.<sup>185</sup> The paragraph restates the intent statute, including the various areas, both curricular and "non-curricular," which the program is meant to improve, also based on the intent statute. The last sentence relies on the provision requiring parent advisory committees and school site councils to retain their responsibilities, as specified. The one problematic reference is to the "Program Quality Review Criteria" which are to provide the "standards of quality" to be "the guides for the school's improvement efforts."<sup>186</sup> As no party submitted to us or directed us to these "Criteria," however, we do not make any determination as to their character.

In Question and Answer 2, the Department lists four major SI Program

components which are no longer required. Only one component presents any question as to whether it expands upon the law in effect. That is the second one, which concerns the school plan.<sup>187</sup> However, this section does not specify whether the "plan" must be written, or be in a particular format. Neither does it require the plan to contain any particular items (other than those listed in subdivision (c), the final sentence following subdivision (f) of Section 52000, the legislative intent section, and as Section 64001, affecting applications for *all* categorical programs, may still require).<sup>188</sup> This provision does not embellish or enlarge upon the statute.

Question 3 asks whether school site councils are still required. The Department refers, without interpreting, to Section 62002.5, which specifies the circumstances under which the law still requires school site councils, and to Section 64001.<sup>189</sup>

Question 4 discusses whether the prior requirements for the "composition, functions, and responsibilities of the school site councils" are still in force.<sup>190</sup> The Department states that

"Section 62002.5 requires that all parent advisory committees and school site councils that were in existence *prior to June 30, 1987*, continue. That is, Section 62002.5 requires that all current and future operating school site councils continue to operate with the same *composition*, functions, and responsibilities required *prior to June 30, 1987*." (Emphasis added.)

As discussed above, Section 62002.5 refers to those committees and councils "in existence *pursuant to statutes or regulations as of January 1, 1979*." The Department appears to be interpreting Section 62002 to mean those committees and councils in existence on June 30, 1987 (the sunset date) and which were created under the law in effect on January 1, 1979. The statute does not say this. Section 62002.5 also refers only to the "*functions and responsibilities . . . as prescribed by the appropriate law or regulation in effect as of January 1, 1979*." (Emphasis added.) Section 62002 does not refer to the composition, nor does it refer to the sunset date except regarding schools which receive funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunset of those programs. Unless there is a statutory or regulatory provision superseding Section 62002.5, these provisions *do* interpret Section 62002.5 and are thus "regulatory."

Questions 5 and 6 cross-refer to General Consideration 6 regarding reimbursable staff development days. These provisions discuss how a school district may participate in the School-Based Coordination Program.<sup>191</sup> As the

Department notes, this program did not sunset when the five enumerated categorical programs did. Thus, the Department cites the School-Based Program Coordination Act section which permits staff development time up to eight days each year to replace the specific staff development time provisions which sunsetted.<sup>192</sup>

Answer 6 then describes how schools may become "School-Based Coordinated Program" schools. The first two of the three mandatory steps on page 10 of the Sunset Advisory generally follow the requirements of the relevant statutes.<sup>193</sup> The third provision requires districts to notify the state oversight unit by filing a certain form.<sup>194</sup> The Legislature has granted the Board of Education specific rulemaking authority to implement this program, but we were unable to find regulations on this procedure.<sup>195</sup> No party supplied us with the Manual of Instruction for the Consolidated Program or the Form SDE 100 mentioned. Thus, we have not reviewed these materials for their regulatory content or their compliance with Government Code Section 11347.5 or other provisions of the APA and cannot express an opinion as to the notification requirement or procedure. However, the Sunset Advisory in itself has no effect either way on the underlying material in the Manual or related procedures.

The "Note" following the three procedural steps appears to restate closely and arrange logically the provisions of Education Code Section 52854.<sup>196</sup> Thus, it contains no "regulatory" material beyond that which the statute requires.

Question 7 asks whether "a district must continue to meet the minimum funding requirements for schools participating in the School Improvement program."<sup>197</sup> Education Code Section 62002 requires the allocation formulas in effect on the sunset date to continue to govern fund disbursement. The Advisory's restatement of this plain legislative provision adds no further embellishment to the statute.

### "III. INDIAN EARLY CHILDHOOD EDUCATION"<sup>198</sup>

Question and Answer 1 describe the "general purpose" of the program by restating, without embellishing, its general legislative intent provisions. Question 2 clarifies the continued requirement for an American Indian Advisory Committee for this program and restates the legal requirements which existed as of January 1, 1979.<sup>199</sup> However, insofar as the Department intends Answer 2 to apply to committees or councils which were *not yet in existence* as of January 1, 1979, it enlarges upon Education Code Section 60002.5, which, as discussed above, applies to committees and councils in existence as of January 1, 1979, not as of the sunset date. Unless other provisions of statute or regulation were in effect at that time, requiring all groups receiving funds to

establish advisory committees appears to be "regulatory," extending beyond the requirements of Section 60002.5.<sup>200</sup>

#### "IV. ECONOMIC IMPACT AID--STATE COMPENSATORY EDUCATION"<sup>201</sup>

Question and Answer 1 quote verbatim the intent sections regarding "Economic Impact Aid, the State Compensatory Education (EIA/SCE) Program."<sup>202</sup>

Question and Answer 2 point out that the "statutory EIA/SCE program remains almost entirely intact" because its provisions are nearly all linked to the funding formula or are permissive.<sup>203</sup>

Question 3 asks what the post-sunset relationship will be between EIA/SCE and federal ECIA (Education Consolidation and Improvement Act), Chapter 1, funds.<sup>204</sup> The Department replies with "three major considerations." First, the Department describes the interaction between ECIA and EIA/SCE program funds purporting to restate the federal requirements. In both paragraphs (a) and (b), the Department states that, under specified circumstances, districts may exclude EIA funds from two ECIA requirements: (1) that federal funds be used to supplement not supplant non-federal funds; and (2) that services in funded project areas be comparable to services provided elsewhere. These provisions are permissive and do not require the districts to do or refrain from doing anything. However, they do establish a general standard, and, insofar as they direct districts concerning how to account for their funds, they may be considered rules or standards of general application.

Paragraphs (a) and (b) *do* restate the federal law in effect at the time of the Advisory, providing the only legally tenable interpretation of the state's options as to how to treat the state and federal funds.<sup>205</sup>

The third paragraph, "(c)," contains the *de facto* repeal of two existing Department regulations.<sup>206</sup> Under most other circumstances, an agency's pronouncement that regulations currently contained in the CCR have been "superseded" would itself meet the definition of a "regulation." (A "regulation" includes revisions to a previously announced rule, and, if not adopted pursuant to the APA, would violate Government Code Section 11347.5 unless otherwise exempted.)<sup>207</sup> However, the Legislature repealed the statutory authority for the regulations, making them legally invalid.

The Department also states that the "superseded" regulations may serve as guidelines or models for the school districts. On its face, this language does not utilize, enforce, or attempt to enforce any guideline, order, or standard of general application; thus rendering it non-"regulatory."<sup>208</sup>

Finally, Question 4 asks what flexibility schools have regarding their EIA funds that they did not have before the sunset date. The sunset provision *removed* restrictions; it did not *impose* new ones. Therefore, as the Department explains in Answer 4, districts may provide services permitted before June 30, 1987, and may also design other programs "which are consistent with former Sections 54000, 54001, and 54004.3," the intent and administrative sections cited above.<sup>209</sup> This question and answer do not embellish upon the law in effect at the time.

## "V. BILINGUAL EDUCATION"<sup>210</sup>

The Department quotes the relevant portions of the intent statute governing the bilingual education program to explain the general or intended purposes of the program as they remain after the sunset.<sup>211</sup> Question 2 asks what districts have to do to meet *federal* requirements to provide appropriate services to LEP (limited English proficiency) students. The Department responds by describing the current state of the federal law with respect to overcoming language barriers to equal educational opportunities.<sup>212</sup> The final paragraph requires districts to follow the already-applicable federal requirements without embellishing upon them.<sup>213</sup>

Question 3 asks what are the minimum post-sunset services which districts must provide LEP students? The Department lists ten items, with the appropriate citations to federal statutes and regulations, applicable federal court decisions, EIA/LEP identification criteria and allocation formulas preserved by the sunset provisions, and other applicable Education Code sections. It is self-evident that districts must still follow the requirements relating to identification of LEP students, as found in the first three items and as underscored by the federal requirements.

The fourth item requires an instructional strategy to achieve certain goals. The combination of the post-sunset requirement to fulfill the program's general purposes and the requirements of the federal law seem to mandate this advice.

The fifth through ninth items follow from the program's general purpose as expressed in the legislative intent provisions, as well as by the dictates of federal law.

The parent advisory committee requirement contained in the last item reflects Education Code Section 62002.5, except for the reference to the sunset date rather than January 1, 1979.

Question 4 asks what is *not* required in light of the sunset of the specific

statutes and regulations. The Department lists seven major specific statutory requirements no longer applicable by the terms of the sunset legislation.<sup>214</sup> The Department reminds schools and districts that "whatever instructional program is implemented to serve LEP pupils" must address "the eight general purposes of former Section 52161," as is clear from Education Code Section 62002.<sup>215</sup> These provisions reflect the sunset provision.

Question 5 asks what effect Education Code Sections 62000-62007 have on EIA/LEP funding. The Department's Answer reflects Section 62002, which continues funding based on the "identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative . . . . "

Question 6 asks whether it is still necessary to fill out the "R-30 annual language census." Again, relying on Section 62002, the Department points out that funding depends in part on identification criteria, which in turn relies on the language census.<sup>216</sup>

Question 7 asks for "general advice . . . regarding changes in current bilingual programs."<sup>217</sup> In response, the Department sets out four areas of *general advice* for general modification and improvement of bilingual programs, in keeping with the greater flexibility provided by the sunset (and consistent with the basic goal of improving academic achievement of LEP students.). The suggestions also caution that programs must still conform with federal law and the eight general purposes of state law.<sup>218</sup> Nothing in these provisions goes beyond making constructive suggestions and restating the applicable law which would limit or guide the districts in taking any of the Department's suggestions.

### **Conclusion regarding Sunset Advisory**

In conclusion, much of the material in this Sunset Advisory is "advisory" in the sense of suggestion or persuasion, rather than "regulatory," that is, issuing or enforcing (or attempting to enforce) guidelines or standards of general application. Few provisions embellish upon the law that the agency administers, but rather, most restate and explain it. The Advisory tries to integrate the statutes which remain valid after the sunset of some but not other provisions which govern several of the categorical funding programs. In these instances, the Department is expressing the only legally tenable interpretation of the law or laws about which it is advising. The rules which do embellish upon the statute, interpreting, implementing or making specific the applicable law, and therefore impose regulatory requirements include:

1. Requiring parent advisory committees or school site councils which

came into existence between January 1, 1979 and June 30, 1987, to continue in existence (General Consideration 3; also Question/Answer 4 regarding the SI Program; and Question/Answer 2 regarding the Indian Early Childhood Education Program).

2. Interpreting the "functions and responsibilities" of these groups to include "composition," and requiring the groups to operate under the laws as of June 30, 1987, rather than January 1, 1979, if that is the intent of the third General Consideration (General Consideration 3 and Question/Answer 4 regarding the SI Program ).

ANALYSIS UNDER THE TWO-PART TEST LEADS US TO CONCLUDE THAT THE PARTS OF THE CHALLENGED ADVISORIES AS ENUMERATED ABOVE ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

The next section of the determination will discuss whether any exceptions to the APA apply to the Department with regard to the challenged agency Advisories *which have been found to constitute "regulations."*

### C.

#### **DO THE CHALLENGED ADVISORIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?**

First, we will discuss exemption<sup>219</sup> issues which apply generally to all of the challenged Advisories. Then, we will discuss exemption issues unique to each of the challenged Advisories.

##### **(1) Education Code section 33308.5 ("Program Guidelines") does not exempt departmental guidelines (so-called "advisories") from the APA**

The Department's Response presumes that Education Code section 33308.5 ("program guidelines") constitutes a blanket exemption from all APA rulemaking requirements (such as public notice and comment, OAL review, and publication in the California Code of Regulations).

Section 33308.5, enacted in 1983, provides:

- "(a) Program guidelines issued by the State Department of Education shall be designed to serve as a model or example, and shall not be prescriptive. Program guidelines issued by the department shall include written notification that the guidelines are merely exemplary, and that compliance with the guidelines is not mandatory.
- "(b) The Superintendent of Public Instruction shall review all program guidelines prepared by the State Department of Education prior to issuance to local education agencies. The superintendent shall approve the proposed guidelines only if he or she determines that all of the following conditions are met:
  - "(1) The guidelines are necessary.
  - "(2) The department has the authority to issue the guidelines.
  - "(3) The guidelines are clear and appropriately referenced to, and consistent with, existing statutes and regulations."

According to the Response, this presumed APA exemption applies if certain requirements outlined in the statute have been satisfied. For instance, the guidelines must contain a specific disclaimer, i.e., a written notification that the guidelines are "merely exemplary" and that compliance with them is not "mandatory." According to the Response, guidelines issued by the Department should be also deemed in compliance with this requirement if the document states simply that it is "advisory only." Further, according to the Response, a guideline which not only (1) fails to state that it is merely exemplary, that compliance is not mandatory, but also (2) fails to state that it is "advisory only," should nonetheless be deemed in compliance with the statutory disclaimer requirement if the guideline refers to a previously issued guideline which *did* state that it was "advisory only."

***We find that Education Code section 33308.5 does not exempt departmental guidelines (also known as "bulletins" or "advisories") from the APA.*** A number of formidable legal obstacles stand in way of the Department's effort to establish that section 33308.5 constitutes an express APA exemption. After reviewing applicable law, we conclude that the Department has not overcome these obstacles.<sup>220</sup>

These obstacles include (1) the statutory requirement that APA exemptions must be expressly stated in statute, (2) the statutory provision that required APA rulemaking procedures apply *in addition to* adoption procedures established in

other statutes, and (3) strict application of these statutory guidelines in the *Engelmann* and *SWRCB v. OAL* cases. The California Court of Appeal has not accepted imaginative arguments that postulate conflicts between APA and agency enabling act provisions in an effort to establish that an implied APA exemption should be recognized. Finally, (4) statutory and case law make clear that an *example* contained in an agency bulletin may be a "regulation," requiring compliance with the APA.

**First**, Government Code section 11346 provides that the APA applies to all quasi-legislative enactments of all agencies, except as expressly exempted by statute.

Section 11346 provides:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. *The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.*" (Emphasis added.)<sup>221</sup>

The APA applies unless a statute "expressly" supersedes or modifies it. In other words, APA exemptions must be "express" in order to be legally effective.<sup>222</sup>

According to the California Court of Appeal, "expressly" means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly."<sup>223</sup> Similarly, "express" is defined by the California Court of Appeal to mean:

"Clear; definite; explicit; unmistakable; not dubious or ambiguous. . . . Declared in terms; set forth in words. Directly and distinctly stated. . . . Made known distinctly and explicitly, and not left to inference. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied.'"<sup>224</sup>

Black's Law Dictionary defines "express authority" as:

"authority given in direct terms, definitely and explicitly, and *not left to inference or implication*, as distinguished from authority which is general,

implied, or not directly stated or given." (Emphasis added.)

If the Legislature had intended to grant the Department an exemption from APA rulemaking requirements, the idea, as Justice Frankfurter has said, "is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it."<sup>225</sup>

When the Legislature wants to expressly exempt an agency from the APA, it knows what to say.<sup>226</sup> As an example of an express APA exemption, the California Court of Appeal has cited Labor Code Section 1185, which provides:

"The orders of the [Industrial Welfare Commission] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby *expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.*"<sup>227</sup> (Emphasis added.)

For an example closer to home, we recall a provision of the Board's enabling act, Education Code Section 33131, which provides in part:

"The standards and criteria for fiscal accountability referred to in Section 33127 *shall not be subject to* Sections 11340 to 11356, inclusive, of the Government Code [the APA]." (Emphasis added.)

Similarly, the Education Code expressly exempts rules of the California Community Colleges from the APA.

"Except as expressly provided by this section, and except as provided by resolution of the board of governors, the *provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to regulations adopted by the board of governors.*" (Education Code sec. 70901.5(b); emphasis added.)

After reviewing these three clear APA exemption provisions, it is apparent that Education Code section 33308.5 fails to qualify as an express exemption.

If the Legislature had wanted to grant a blanket APA exemption to the Department of Education, the statute would have read something like this:

"(a) Program guidelines issued by the State Department of Education *are not subject to Chapter 3.5 (commencing with Section 11340) of*

*Part 1 of Division 3 of Title 2 of the Government Code* [the APA] if all of the following conditions are satisfied:

- "(1) The program guidelines are (i) designed to serve as a model or example and are (ii) not prescriptive.
- "(2) The program guidelines include a written notification that the guidelines are merely exemplary and that compliance with the guidelines is not mandatory.
- "(3) The Superintendent of Public Instruction has reviewed the program guidelines prior to issuance to local education agencies.
- "(4) The program guidelines include a written determination by the Superintendent of Public Instruction that
  - "(i) The guidelines are necessary,
  - "(ii) The Department has the authority to issue the guidelines.
  - "(iii) The guidelines are clear and appropriately referenced to, and consistent with, existing statutes and regulations." (Emphasis added to hypothetical statute to illustrate express exemption language.)

***Second***, Government Code section 11346 merely establishes "basic *minimum* procedural requirements" (emphasis added) for the adoption of administrative rules. Section 11346 recognizes that other statutes may well impose additional requirements on rulemaking agencies.

Section 11346 makes clear that *both* sets of requirements apply--(1) the requirements spelled out in the APA and (2) whatever requirements may appear in a second statute. The fact that the APA imposes one set of requirements does not mean that any other requirements are repealed or diminished. The fact that another statute (outside the APA) may impose additional requirements does not mean that APA requirements are thereby superseded or modified, "except to the extent that such legislation shall do so *expressly*." (Emphasis added.)

***Third***, the statutory guidelines found in Government Code section 11346 have been strictly applied in the *Engelmann* and *SWRCB v. OAL* cases.

The 1991 case of *Engelmann v. State Board of Education*, which involved the precise issue of the meaning of "expressly" for purposes of Government Code Section 11346, makes it clear that California courts will strictly enforce this APA provision.

The *Engelmann* court held that:

" . . . Government Code [Section 11346] allows other statutes to preempt it *only where they are subsequently enacted and do so expressly*." <sup>228</sup>

Both the *Engelmann* and the *SWRCB v. OAL* courts were confronted with adoption procedures spelled out in statutes other than the APA. These rule adoption procedures were much more substantial than the internal agency review and boilerplate disclaimer requirements of Education Code section 33308.5. Despite the existence of these substantial additional procedures, these two courts strictly applied Government Code section 11346, concluding that the APA applied to, respectively, regional water quality control plans and textbook selection guidelines.

Though we do not have the benefit of legislative declarations of intent, It is not difficult to harmonize Education Code section 33308.5 with the APA. It appears that there had been a long term problem involving the issuance of regulatory guidelines by officials in the Department of Education. Section 33308.5 attacks this problem on two fronts.

First, it requires that all guidelines be reviewed and approved by the Superintendent prior to issuance to local education agencies. This would ensure that these documents reflect high-level priorities. Also, the Superintendent is required to ensure that the guidelines are necessary, that the Department has the authority to issue them, and that they are clear, appropriately referenced to, and consistent with existing statutes and regulations. Further, the guidelines must contain a disclaimer that they are merely exemplary, and that compliance is not mandatory.

Second, the guidelines are not to be prescriptive, they must be designed to serve solely as a model or example. The term "prescriptive" is not defined in section 33308.5; according to the American Heritage Dictionary, however, it means "[m]aking or giving injunctions, directions, laws, or rules." <sup>229</sup>

Read together with the APA, this latter provision of section 33308.5 should be construed as follows. The guidelines are limited to non-regulatory material. They may not impose prescriptive (i.e., regulatory) requirements on local education agencies; the guidelines must be carefully drafted to serve as no

more than "models or examples."

Guidelines must, according to Education Code section 33308.5, be consistent with existing statutes. The APA is an "existing statute." Issuance of regulatory guidelines has been expressly prohibited by Government Code section 11347.5, part of the APA. The 1955 legislative report quoted in *Armistead* warned that agencies were violating the APA by issuing "guides" containing regulatory material.<sup>230</sup> According the California Court of Appeal, even detailed regulatory guidelines are subject to the APA.<sup>231</sup> If guidelines are regulatory in nature, then they are not "consistent with . . . existing statutes." .

Further, administrative bulletins ("guidelines") can be very useful in conveying news of late-breaking legal developments, including recently enacted statutes, recently approved regulations, and recent court decisions. See, e.g., **1986 OAL Determination No. 7** (agency bulletin which did no more than inform interested parties of requirements of recent court decision was not "regulatory").<sup>232</sup> Section 33308.5 carefully specifies that the Superintendent is to review guidelines prior to issuance to ensure that they are appropriately referenced to and consistent with such statutes and regulations. Carefully drafted guidelines will be limited to explaining duly adopted legal enactments. They will not attempt to fill in gaps in the statutory scheme; they will not impose potentially costly local mandates or other new requirements. Directed at a non-lawyer audience, they will provide concrete examples of what new legal requirements mean in practice. They will help readers understand the significance of new laws and court decisions. Examples will be discussed in detail under the next heading.

*Fourth*, statutory and case law make clear that an example contained in an agency bulletin may be a "regulation," requiring compliance with the APA. Certain types of examples are perfectly legal: they may be disseminated by agencies without violating the APA. Basically, regulatory examples are not allowable, while non-regulatory examples are not only allowable, but indeed encouraged.

Examples have historically played a useful role in articulating and explaining legal standards, from ancient criminal law<sup>233</sup> to modern IRS regulation. Review of the statutory definition of "regulation" and of a recent appellate case makes it clear, however, that simply structuring a new rule in the form of an example does not immunize it from APA compliance requirements.

The definition of "regulation" includes not only basic rules adopted by agencies to "*implement, interpret, or make specific* the law enforced by the agency," but also "the amendment, *supplement*, or revision of [such] rules . . . ."

(Government Code section 11342, subdivision (b); emphasis added.) Thus, at the first level of analysis, one would ask if an example contained in an uncodified agency pronouncement had the effect of creating a rule which implemented or made specific a law enforced by the agency, such as a statute. If the answer were "yes," there would be no need to go on to the next step; it would already be clear that the rule/example was subject to the APA. If the answer were "no," the next inquiry would be whether or not the example had the effect of "supplementing" a duly adopted rule, such as a regulation printed in the California Code of Regulations.

Some examples merely provide a plain English illustration of how a straightforward, duly adopted rule applies in a concrete situation; such examples typically do not violate the APA because they fail to satisfy the two part "regulation" test. Other examples are more problematic. They may, for instance, dramatically clarify a vague statute--and satisfy the two-part "regulation" test.<sup>234</sup>

Many examples are non-regulatory. This type of example merely explains how rules contained in a duly adopted provision of law apply in a concrete instance. For instance, a recent state personnel newsletter explained a new Accelerated Benefit Option "ABO" in life insurance policies covering certain state employees:

*"The ABO allows the employee to select payment up to 50% of the face amount of the policy (50% is the maximum) with a service charge of 4% of the amount paid. For example, a managerial employee has \$50,000 of life insurance coverage. If that employee qualified for the ABO and requested 50% of the face amount of his/her insurance, this would amount to a payout of \$24,000 to the employee before death, and a \$1000 service charge. At the time of death, the beneficiary would receive \$25,000, for a total policy payout of \$49,000 with the \$1000 service charge for the ABO."* (Emphasis added.)<sup>235</sup>

The operative rule is stated in the first sentence of the quotation. The emphasized part of the above quotation straightforwardly applies this rule. Examples such as this are very useful in helping readers understand what a particular rule means in practice. This sort of example does not make new law: it does not fill in gaps in the statutory scheme, resolve ambiguities, create exceptions, or add new requirements.

Other examples violate the APA. For instance, in *Union of American Physicians and Dentists v. Kizer* (1990),<sup>236</sup> the California Court of Appeal held that an example contained in an agency bulletin (the Department of Education

calls its bulletins "advisories") violated the APA. According to the Department of Health Services, the purpose of the bulletin was "to *supplement* information in the CMA Relative Value Studies [part of a duly adopted regulation] and to *help clarify* billing guidelines." (Emphasis in original.) The duly adopted regulation defined the term "intermediate service" as follows: "a complete history and physical examination of one or more organ systems, but not requiring a comprehensive evaluation of the patient as a whole."

The Health Services bulletin gave a much lengthier definition of "intermediate service," complete with six detailed examples. The bulletin read in part: "*For example:* [paragraph] a. The evaluation of a patient with arteriosclerotic heart disease with recent onset of unstable angina . . . ." <sup>237</sup> Physician claims which appeared valid--based on the duly adopted regulation-- were apparently denied, based on the supplemental guidelines contained in the bulletin.

It is, of course, highly desirable that statutes be clear--and if not clear, be clarified. However, governing law requires that such clarifications be undertaken in one of two prescribed ways: either by amending the statute or by adopting a regulation in compliance with the APA. <sup>238</sup> Both methods have the advantage of providing an opportunity for public comment prior to implementation of the policy. Well intentioned agency clarifications may have unintended negative consequences, such as elimination of jobs within California. In the APA, the Legislature has provided a carefully structured process, designed to ensure that agencies have full information before making decisions and that agencies assess certain critical impacts of proposed new policies. <sup>239</sup>

For the reasons noted above, we conclude that Education Code section 33308.5 does not exempt departmental guidelines (so-called "advisories") from the APA.

## **(2) Internal Management Exception**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. <sup>240</sup> However, rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.

Government Code Section 11342, subdivision (b), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general

application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, *except one which relates only to the internal management of the state agency.*" (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code Section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the statutes.' . . . [Fn. omitted.]" . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.]"<sup>241</sup>

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[.]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal

The Department argues that several of the rules or requirements found to be "regulations" are merely "housekeeping" details. This contention appears meant to support the claim that the Advisories consist, at least in part, of material which is exempt from the APA because it falls within the "internal management" exception. Like the personnel rule at issue in *Armistead*, however, the rules to which the Department directs this argument affect a broad segment of the population. The Department has addressed each Advisory to "All County and District Superintendents," and, in some cases, has added more specific routing information. These addressees are not within the state agency; thus, the address alone indicates strongly that the contents of these "Advisories" do not "relate[ ] only to the internal management of the state agency." The particular requirement may be to perform a specified certification or to fill out a particular form; the consequence of failing to comply with the requirement may be the denial of funding to programs serving children. For example, in the Supplemental Grants Advisories, the Department requires local districts to sign particular assurances as a condition to funding. In spite of the Department's protests, this requirement is not merely a "'housekeeping' matter." It does not affect only the internal affairs of employees of one state department; rather it concerns a matter of import to all of the public interested in funding for education. It is a rule of general application, specifying a separate requirement to implement the statute. A rule which requires *local* school employees to perform specified acts under threat of being denied funding does not fit the definition of "one which relates only to the internal management of the *state* agency."

Thus, the portions of the challenged Advisories found to be "regulatory" do not fall within the internal management exemption.

### (3) Forms Exemption Theory

Under this heading, we focus our inquiry solely on the portions of the Work Permit Forms (B-1 and B1-4) which have been found to be "regulations."

"'Regulation'" does not mean or include . . . any form prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted WHEN ONE IS NEEDED TO IMPLEMENT THE LAW* [i.e., statute] *under which the form is issued.*" (Government Code Section 11342, subdivision (b), emphasis added.)

This statutory language creates a "statutory exemption relating to *operational*

forms."<sup>243</sup> A regulation is *not* "needed to implement the law under which the form is issued," if the form in question is a straightforward operational form limited in scope to *existing* legal requirements. An example of an operational form would be one which simply provides a convenient space in which, for example, applicants for licenses could write down information that existing provisions of law already require them to furnish to the agency, such as the applicant's name.

By contrast, if an agency form *adds anything to existing legal requirements*, then, under Government Code section 11342(b), a formal regulation is "needed to implement the law under which the form is issued." For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when existing law required none of these items of information. The hypothetical licensing agency would be making new law: "the hypothetical licensing agency will approve no license application unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion." Clearly, if a form contains "*uniform substantive*" rules<sup>244</sup> that implement a statute, the agency must promulgate those rules in compliance with the APA. On the other hand, a "regulation is *not* needed to implement the law under which the form is issued" (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements.

Any interpretation of the forms language in section 11342(b) which would permit agencies to avoid mandatory APA rulemaking requirements by simply typing regulatory material into a "form" leads to absurd consequences. Agencies could ignore all APA requirements at will; the exception would swallow the rule.<sup>245</sup>

Since the portions of the challenged work permit forms found to be "regulations" do not fall within the so-called forms exception, we conclude that they are "regulations," and that they thus violate the APA.

#### (4) Opinions-of-Counsel APA exemption theory

The Department argues that *legal* advisories cannot constitute "regulations" because they are both labeled and perceived as advisory in nature. "Legal advisories are merely *the opinion of the Department of Education's counsel* and, although appreciated and considered an important indicator of Department policy carry no more authoritative weight than [the opinions of the law firm representing a particular school district]."<sup>246</sup>

We must reject this assertion. Interpretations of statute issued by state agencies

are not exempt from the APA simply because they are issued by counsel. Two authorities support this proposition: an APA provision and an appellate opinion.

First, the APA expressly exempts legal opinions of counsel of two specified agencies. Government Code section 11342, subdivision (b) provides that "[r]egulation' does not mean or include legal rulings of counsel issued by *the Franchise Tax Board or State Board of Equalization*. . . ." (Emphasis added.) The Legislature did not elect to include either the Department of Education or the State Board of Education in this list. Clearly, then, statutory interpretations issued by the Department cannot be deemed exempt from the APA on the strength of an "opinion of counsel" label. As noted above, the recent *SWRCB v. OAL* case teaches that the proper focus is on the content--not the label--of agency enactments.

Second, in *Goleta Valley Community Hospital v. State Department of Health Services* (1983),<sup>247</sup> the California Court of Appeal struck down as an underground regulation a legal interpretation contained in a letter written by a departmental staff attorney. Thus, legal interpretations are not immune from APA compliance requirements simply because they are contained in documents signed by lawyers.<sup>248</sup>

As discussed in detail above, the Channel One Legal Advisory--the only *legal* advisory under review in this proceeding--unequivocally states that state money will not be paid for student time spent viewing Channel One commercials. Given (1) the financial straits most local school districts are in these days and (2) the absolute clarity of the "don't do this, or else we withhold money" statement in the Advisory, the allegation that departmental legal advisories "carry no more authoritative weight" than does an opinion of the school district's private attorney is most unconvincing.

#### IV. SUMMARY

HAVING FOUND PORTIONS OF THE CHALLENGED ADVISORIES TO BE "REGULATIONS" AND NOT EXEMPT FROM THE REQUIREMENTS OF THE APA, WE CONCLUDE THAT THOSE PORTIONS OF THE CHALLENGED ADVISORIES VIOLATE GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (a).

#### V. CONCLUSION

For the reasons set forth above, OAL finds that:

- A. Applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the rulemaking requirements of the APA;
- B. The following challenged rules are "regulations" as the key provision of Government Code Section 11342, subdivision (b), defines "regulation":

**1. Channel One Legal Advisory:**

The State Department of Education pronouncement that it will not accept certifications as to days and minutes of instruction from school districts and county offices of education to the extent that they include time spent by pupils watching commercials which are part of "Channel One" or similar television programs.

**2. Work Permit Fiscal Management Advisory:**

The requirements for:

- (a) the *district's* periodic review of student records supporting the work permit;
- (b) periodic review by *Department* staff;
- (c) in the Form B1-1, for additional information from the employer, such as wages and the employer's workers' compensation carrier, and for the supervisor's signature;
- (d) in the Form B1-1 and Form B1-4, the work permit, for school information without the qualification of Section 49115, subdivision (b).

**3. Supplemental Grants Program Advisories:**

- (a) Restricting Supplemental Grants funds to the *general purposes* or *general intent* of the categorical programs;
- (b) Requiring equitable proration and a specified authorized representative letter for Joint Powers Agreement districts;
- (c) Prohibiting districts from reallocating the prior-year

funds used for categorical programs to other programs;

(d) Requiring districts to sign an assurance that they have not reallocated prior-year funds to other programs now that Supplemental Grant funds are available;

(e) Imposing any fiscal requirements on the Supplemental Grants funds that are not already imposed on all appropriations by statute or duly adopted regulation.

**4. Sunset Program Advisory:**

(a) Requiring parent advisory committees or school site councils which came into existence between January 1, 1979 and June 30, 1987, to continue in existence (General Consideration 3; also Question/Answer 4 regarding the SI Program; and Question/Answer 2 regarding the Indian Early Childhood Education Program).

(b) Interpreting the "functions and responsibilities" of these groups to include "composition," and requiring the groups to operate under the laws as of June 30, 1987, rather than January 1, 1979, if that is the intent of the third General Consideration (General Consideration 3 and Question/Answer 4 regarding the SI Program).

- C. The remaining provisions of the challenged "Advisories" are not "regulations" as the key provision of Government Code Section 11342, subdivision (b), defines "regulation."
- D. No exceptions to the APA requirements apply to the challenged rules found to be "regulations;" and
- E. The rules listed above in Finding "B" violate Government Code Section 11347.5, subdivision (a).

DATE: December 22, 1994

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1. Howard Dickstein, as attorney for the Milton Marks Commission on Governmental Organization and Economy, more commonly known as the "Little Hoover Commission," filed this Request for Determination. Joseph R. Symkowick, General Counsel, represented the Department of Education.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year. Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1994 OAL Determination No. 1.**"

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code Section 11347.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

Authorities discovered since fifth survey

(1) Note 2 to **1993 OAL Determination No. 4** cited *Domar Electric, Inc. v. City of Los Angeles* (1993) 23 Cal.Rptr.2d 857. On January 20, 1994, the California Supreme Court granted a hearing in *Domar Electric*, which means that the opinion issued by the California Court of Appeal, Second Appellate District, Division One, has been depublished (i.e., may no longer be cited as precedent).

(2) Note 30 to **1993 OAL Determination No. 4** stated in part:

"An example of the Attorney General's opinion-writing function may be found in two matters currently pending in the Opinion Unit:

\* Request no. 93-205, from Senator Quentin Kopp, which asks 'Is the Cal. State University [Sacramento] affirmative action program constitutional?'

\* Request no. 93-813, from Thomas J. Nussbaum, Vice Chancellor and General Counsel, California Community Colleges, which asks 'Are the state laws pertaining to contracting with minority and women business enterprises consistent with the United States Constitution?' (Emphasis added.)

*On January 13, 1994, the Attorney General issued the opinion requested by Senator Kopp. 77 Ops.Cal.Atty. Gen. 1 (1994). The opinion concluded that state agency voluntary affirmative action plans may violate a number of constitutional and statutory provisions unless specified guidelines are followed:*

"The California State University may voluntarily consider racial, ethnic, and gender characteristics in employing its faculty to remedy the effects of its own past discriminatory hiring practices. Where evidence of such practices, which must be convincing, is based upon statistical disparity, the comparison must be between the composition of its faculty and the composition of the qualified population in the relevant labor market. This consideration must be closely related to the degree, nature, and extent of such prior discrimination."  
(Conclusion of Opinion.)

(3) In **1993 OAL Determination No. 4**, section II discussed "*Personnel Board's APA Compliance History*" (Notice Register pp. 64-65). Two pertinent judicial opinions have been handed down since issuance of the determination.

In January 1994, the California Court of Appeal, Third District, issued *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 29 Cal.Rptr.2d 191. In this case, the Department of General Services ("Department") sued the State Personnel Board ("Board"), arguing that the Board had improperly blocked the Department's attempt to reject an employee during probation. The Department argued that the Board had invoked an uncodified rule--a rule which could be found in neither statute nor regulation. The Court agreed with the Department, holding that the Board had "no authority to fashion this hybrid civil service classification ipse dixit" (29 Cal.Rptr.2d at 197); that the Board could not be permitted in the guise of

"interpretation" to enlarge the scope of the statutes; and that the Board had improperly made an "agency determination of *legislative* policy" (29 Cal.Rptr.2d at 198; emphasis added). In other words, the court found that SPB had improperly attempted to exercise powers granted to the Legislature.

In September 1994, the California Court of Appeal, Fifth District, decided *Larson v. California State Personnel Board* (1994) 28 Cal.App.4th 265, 33 Cal.Rptr.2d 412. In this case, the Department of Developmental Services and a developmental center employee had negotiated a settlement of a disciplinary action and jointly withdrew from an administrative proceeding pending before the Board. The Board then invoked an uncodified policy under which parties to disciplinary proceedings could not settle a pending case unless the Board approved the terms of the settlement. The Court struck down this policy as inconsistent with statute. The Court also asked why, if the parties have settled their argument, should the Board force them to continue the proceeding and waste time, money, and quasi-judicial resources, unless the parties had agreed to let the Board decide if it agreed with the settlement.

- (4) In an opinion issued July 20, 1994, the Attorney General stated that the California Postsecondary Education Commission may not adopt "*formal* regulations" (emphasis added) implementing a federal program until the Commission first obtains a grant of statutory rulemaking authority from the California Legislature. (77 Ops.Cal.Atty. Gen. 159, 161.) In a curious dictum, the opinion goes on to state:

"Regulations do not include *informal* guidelines, policy manuals, or recommended procedures which, while useful in establishing statutory standards, lack the force of law. (*Posey v. California* (1986) 180 Cal.App.3d 836, 849; emphasis added.)"

The quoted statement, while an accurate summary of a holding made in a 1986 *Tort Claims Act* case (i.e., *Posey*), cannot be reconciled with governing statutes and cases interpreting the *Administrative Procedure Act*. The basic problem is that the *Tort Claims Act* definition of "regulation" differs substantially both in its language and its purpose from the APA definition of "regulation."

The thrust of the quoted sentence from the July 1994 Attorney General's opinion is strikingly inconsistent with (1) the unanimous holding of the California Supreme Court in *Armistead v. State Personnel Board*, (2) the statute codifying the *Armistead* holding, Government Code section 11347.5, (3) and numerous regulatory determinations issued by OAL pursuant to Government Code section 11347.5. OAL's regulatory determinations faithfully reflect the policy decision reflected in the express terms and legislative history of Government Code section 11347.5. Confirmation of this may be found in the fact that the Legislature has several times amended section 11347.5 without counteracting OAL's application of this section. See, e.g., Statutes of 1994, Chapter 1039 (AB 2531/Gotch). When the Legislature desires to exempt a category of agency enactment from the APA, it does so expressly in statute. See, e.g., Government Code section 11342.5 (responding to 1990 OAL Determination No. 12).

In 1978, the *Armistead* Court struck down an informally adopted "policy manual"

provision as violative of the APA. Government Code section 11347.5 prohibits state agency use of uncodified or "informal" rules meeting the definition of "regulation" contained in Government Code section 11342, subdivision (b)--unless those rules have been adopted pursuant to the APA. Government Code section 11347.5 prohibits use of any "*guideline*, criterion, bulletin, *manual*, instruction, order, standard of general application, or other rule . . ." (emphasis added) unless duly adopted. Thus, it is clear that state agencies may not legally issue "regulations" under the guise of guidelines or manuals.

Further, the 1994 Attorney General's opinion states in part: "[r]egulations do not include informal . . . policy manuals . . . which . . . *lack the force of law*." (Emphasis added.) This is a curious statement. Of course, a manual provision (such as that invalidated in *Armistead*) lacks the force of law. It lacks the force of law *because it has not been properly adopted as a regulation pursuant to the APA and published in the California Code of Regulations*. The whole point of *Armistead* and Government Code section 11347.5 is to make clear that agency "regulations" which have not been adopted in accordance with statutory requirements (i.e., APA) are invalid and may not be issued or utilized by the agency.

By definition, all informally issued agency enactments lack the force of law. (We assume that the enactment does not simply repeat a provision of duly adopted constitutional, statutory, regulatory, or decisional law.) Since *all* informally issued agency enactments lack the force of law, applying the Attorney General's proposition would logically mean that *all* (i.e., 100% of) agency guidelines, criteria, bulletins, manuals, instructions, etc., would be perfectly legal and that agency compliance with APA rulemaking requirements would become purely optional. We must reject this extraordinary analysis. It cannot be reconciled with governing law.

(See also 1986 OAL Determination No. 6, p. 16 (rejecting argument that for an uncodified agency enactment to constitute a "regulation," it must (1) be intended to have and (2) have the force and effect of law); *State Water Resources Control Board v. Office of Administrative Law* (1993), *supra* (if agency rule "looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it"); and Shakespeare, *Romeo and Juliet*, II, ii, 43 ("What's in a name? That which we call a rose by any other name would smell as sweet").)

- (5) A 1977 opinion of the Attorney General narrowly construed the APA's internal management exception.

"The question was whether members of the Fair Political Practices Commission (FPPC) were entitled to compensation for participation in meetings, hearing[s], and other activities at which FPPC personnel participated. The Attorney General concluded that FPPC-promulgated rules and standards interpreting [Government Code] section 83106 which authorizes compensation for 'official duties,' would be of general application and 'are not such that relate only to the internal management of the commission and therefore must be promulgated in accordance with the Administrative

Procedure Act . [Citation.] (60 Ops.Atty.Gen. 16 (1977) 16, 22-23.)" *American Federation of State, County and Municipal Employees v. Department of Rehabilitation*, 3 Civ. 26025, slip op. at 13, n. 6 (California Court of Appeal, Third District, Oct. 10, 1986) (directive interpreting departmental incompatible activities statement violated APA), quoted in *Decision re Approval of a Regulatory Action*, 87-0925-04, slip op. at 12 (Office of Administrative Law, November 24, 1987) (approved a proposed Department of Personnel Administration regulation setting up process for development and review of incompatible activity statements; found, however, that requirements of APA must also be met by state agency when adopting incompatible activity statement that is of statewide concern).

Citing *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942-43, the Attorney General stressed the fact that the Government Code provision to be implemented by the FPPC was "a law involving an important public interest." 60 Ops.Cal.Atty.Gen. at 22, n. 3.

The 1977 opinion's narrow reading of the internal management exception is strikingly similar to the approach taken the following year by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr.1 (personnel manual's rule governing withdrawal of state employee resignations not "internal management"). Indeed, in one respect the 1977 opinion gives the APA internal management exception an even narrower reading than does the *Armistead* court: the FPPC rule under discussion in the Attorney General opinion applied solely to employees of *one* state agency, while the State Personnel Board rule at issue in *Armistead* applied to employees of *all* state agencies.

- (6) *Jones v. Tracy School District* (1980) 27 Cal.3d 99, 108, 165 Cal.Rptr. 100, 104 (administrative interpretation of statute contained in Division of Labor Standards Enforcement, Internal Policy/Procedure Memorandum No. 79-2 *not* followed by court because (1) interpretation had not been subject to notice and hearing process of proper APA administrative procedure and (2) Memorandum was composed and circulated after the issuing state agency became friend-of-the-court in case at bench).
- (7) *City of Los Angeles v. Los Olivos Mobile Home Park* (1989) 213 Cal.App.3d 1437, \_\_\_, 262 Cal.Rptr. 446, 449, review denied (not appropriate for court to defer to administrative interpretation of city ordinance where interpretation appeared in internal memorandum of city department, rather than in regulation adopted after public notice and hearing).
- (8) *California State Employees Association v. California State Personnel Board* (1986) 178 Cal.App.3d 372, 380, 223 Cal.Rptr. 826, 829 (rule that court should ordinarily defer to contemporaneous administrative interpretation of statute by agency charged with enforcing a particular statute, applies "with most vigor" to interpretations contained in formally promulgated administrative regulations; deference to interpretations found in informal memoranda prepared for use in litigation is inappropriate).
- (9) *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 1226, 236 Cal.Rptr. 853, 857 (administrative interpretation entitled to "no weight")

because it was found in series of inter-departmental communications, rather than in formally promulgated regulation).

- (10) *Livadas v. Bradshaw* (N.D. Cal. 1994) \_\_\_\_ F.Supp. \_\_\_\_, 94 Daily Journal D.A.R. 15593 (Labor Commissioner's uncodified policy--declining to seek state statutory penalty from employer for failure to pay terminated employee wages due on last work day if employee was covered by collective bargaining agreement--struck down as violative of federal law; federal district court approved consent decree which mandated issuance of Interpretive Bulletin which stated legally correct method of processing such claims).
- (11) A Superior Court has ruled that precedent decisions designated by the California Unemployment Insurance Appeals Board ("CUIAB") are invalid due to failure to comply with the APA. *Bacon v. CUIAB* (Butte County, No. 114071, June 29, 1994). In response to this judicial ruling, urgency legislation taking effect September 27, 1994 has been enacted which expressly exempts CUIAB precedent decisions from APA rulemaking requirements. (Statutes of 1994/ Chapter 967; SB 1584/Johnston; Unemployment Insurance Code section 409.) OAL had earlier ruled that an Energy Commission precedent decision designated without benefit of an express APA exception violated the APA. **1993 OAL Determination No. 1** (Energy Commission, April 6, 1993), California Regulatory Notice Register 93, No. 16-Z, April 16, 1993, p. 413.

Drawing upon a proposal pending before the California Law Revision Commission, the amended Unemployment Code section 409 also requires the CUIAB to (1) maintain an index of precedent decisions, (2) to update the index at least annually, (3) to make the index available to the public by subscription, and (4) to annually publicize the availability of the index in the California Regulatory Notice Register. The Law Revision Commission proposal would apply to all state agencies.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), Section 121, subdivision (a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code Section 11342(b), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. The attachment the Commission provided consists of a three-page News Release dated 5/25/89, numbered "REL#89-53," with an attachment described as the "executive summary of the State Department of Education's Legal Advisory on commercial broadcasts." The final sentence of the news release states: "A longer version of the Advisory is currently in preparation and will be issued next week." Neither the Requester nor the Department provided a longer version of the Legal Advisory.

5. We quote material describing the advisories from pages 1 and 2 of the Request for Determination dated May 25, 1990.

6. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code Section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code Section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of Section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] Section 11347.5,

subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] Section 11342, subdivision (b), *we accord its determination due consideration.*" (*Id.*; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "*entitled to due deference.*" (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

7. Note Concerning Comments and Responses

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, Sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

8. If an uncodified agency rule is found to violate Government Code Section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code Section 11347.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute). Of course, an agency rule found to violate the APA could also simply be rescinded.
9. Pursuant to Title 1, CCR, Section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
10. We refer to the part of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, Sections 11340 through 11356. According to Government Code Section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, *the Administrative Procedure Act.*" (Emphasis added.)

The rulemaking part of the APA and all OAL Title 1 regulations are reprinted and indexed in an annual booklet, which is available from OAL (916-323-6225) for a small charge.

11. Government Code Section 11347.5 provides:

- "(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.*
- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
  - "1. File its determination upon issuance with the Secretary of State.
  - "2. Make its determination known to the agency, the Governor, and the Legislature.
  - "3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
  - "4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following

occurs:

- "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
- "2. The proceeding began prior to the party's request for the office's determination.
- "3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

(Emphasis added.)

12. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431; 268 Cal.Rptr. 244, 249, review denied.
13. 13 Cal.App.4th 720, 16 Cal.Rptr.2d 727
14. *Supra* at 16 Cal. Rptr.2d 749.
15. Education Code Section 33301, subdivision (a).
16. Generally set out in several Sections of the Education Code.
17. Education Code Sections 33004, 33301, subdivision (b), and 33303. Note that Section 2, Article 9, of the California Constitution requires that the qualified electorate choose the Superintendent of Public Instruction.
18. OAL does not review alleged underground regulations for compliance with APA's six substantive standards

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code Section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six

substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code Section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices. Individual agencies--not OAL--maintain individual rulemaking mailing lists.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

19. For example, the Department attached a list of various statutes which bestow rulemaking authority upon it with respect to a number of different programs.
20. See Title 5, Section 16000 regarding approval of contracts with the federal government, expressly stating that the Superintendent of Public Instruction issued the regulation.
21. See, for example, Sections 15450 *et seq.* of Title 5 of the CCR.
22. "Under the School Code, which provided that the department should succeed the state board of education, the transfer of duties was to the department, which was a collective term describing the entire state school system, and which was administered jointly by a governing and policy-determining body, the state board of education, and executive officer, the director of education." 1 Ops.Atty.Gen. 36 (1943). Section 33303 provides that the Superintendent of Public Instruction is, *ex officio*, the "Director of Education."
23. *K-12 Education in California: A Look at Some Policy Issues*, p. 35.
24. On June 4, 1990, Mr. Dickstein filed an amended declaration, and on June 5, 1990, OAL sent a Notice of Acceptance to the Requester.
25. As noted above, the Commission provided a three-page News Release dated 5/25/89, numbered "REL#89-53," with an attachment described as the "executive summary of the State Department of Education's Legal Advisory on commercial broadcasts."

The item attached to the News Release is another three-page document, dated May 24, 1989, and entitled "Legal Advisory, REL#89-53," with the legend "LO: 2-89." The subject is "Requiring Students To View 'Channel One' and Other Similar Television Programs Sponsored by Commercial Advertisers," and the body of the text is entitled "Executive Summary."

26. As described in pages 1 and 2 of the Request for Determination dated May 25, 1990.
27. \_\_\_ Cal.App.4th \_\_\_, 34 Cal.Rptr.2d 108, 114.
28. California Regulatory Notice Register 91, No. 16-Z, April 19, 1991, p. 591.
29. The Response, with attachments, was submitted on behalf of the Department by Joseph Symkowick, General Counsel to both the Department *and* the Superintendent of Public Instruction, who was Bill Honig at the time of the Request and Response.
30. Budgetary constraints have caused OAL's total staff to decline from 50 to 23 over the past four years. At the same time, the number of proposed regulations submitted to OAL has increased. Also, new litigation duties (e.g., *SWRCB v. OAL*) have absorbed considerable staff time. In these circumstances, it has proved difficult to process requests for determination as quickly as we would like to.
31. *Dawson*, supra, 34 Cal.Rptr.2d at 113.
32. 34 Cal.Rptr.2d at 115-116.
33. 34 Cal.Rptr.2d at 128.
34. As the Department notes, **1990 OAL Determination No. 6**, Docket No. 89-012, March 20, 1990, determined that the policies contained in Child Development Division Policy Memo No. 88-11, "Budget guidelines for Child Development Programs," were "regulations" required to be adopted in compliance with the Administrative Procedure Act before the Department could enforce them.
35. Page 1, Department's Response of June 3, 1991.
36. A specific contention concerning *Legal* Advisories will be addressed under the section III. C. of this determination (APA exceptions).
37. Response, p. 2.
38. Response, p. 2.
39. An agency rule need not be phrased in mandatory language in order to constitute a "regulation." In *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 503, 272 Cal.Rptr. 886, 892, the state agency argued that the documentation requirements under review were "simply informational in nature and do not seek to substantially regulate behavior." The Court rejected that argument, noting simply:

"The contention is unpersuasive because, as discussed above, agency rules which 'interpret, or make specific' the law enforced by the agency require the promulgating agency to comply with the APA. (Gov. Code, sec. 11342(b).)"
40. pp. 17-18

41. The Response describes the list as " . . . legislative authorities empowering the Superintendent of Public Instruction (SPI) specifically to adopt regulations . . . " page 2, Response. However, the authorities in the list actually include several types of mandates and authorizations. Some sections explicitly grant or assume rulemaking authority, some direct the SPI to develop or establish policies, and other sections direct the SPI to prepare other documents, such as a budget or a model policy for school districts.
42. Response, page 2, quoting from May 20, 1991, Comment, page 3.
43. In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, the Court rejected the argument of the State Department of Health Services that its interpretation was the "only legally tenable interpretation of its statutory auditing authority." Thus, the Court accepted by implication the premise that *if* the agency's unadopted auditing method *had been* the only legally tenable interpretation, it would not have violated Government Code Section 11347.5.
44. The Department argues

"that OAL must accord respect and deference to informational and descriptive treatment of legal requirements in CDE [California Department of Education] advisories. CDE's statutory, regulatory, and case law descriptions which are reasonable and not clearly erroneous should not be branded by OAL as impermissible interpretations which are prohibited by Government Code section 11347.5, subdivision (a).

"Yet, a review of OAL's prior determinations reveals *no* expressly stated weight or respect being afforded agency construction of statutes they enforce. The prior determinations all silently presume that OAL has *carte blanche* authority under Government Code section 11347.5 to evaluate all requests for determination which are made to it. This view was recently vindicated in *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 434-35, citing *Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 204-205. What neither prior OAL jurisprudence nor *Grier/Armistead* address, though is whether OAL *itself* must defer to an agency's understanding of the statutes it enforces. Where the agency asserts that it has not illegally interpreted but merely repeated the law, must OAL defer? CDE's answer, based upon hornbook law, is affirmative.

"The California Supreme Court recently reiterated the deference owed by the courts to reasonable administrative constructions of statutes:

' Further, it must be emphasized 'that "the construction of a statute by officials charged with its administration . . . is entitled to great weight" . . . .' (*Industrial Welfare Com. v. Superior Court*, supra, 27 Cal.3d at p. 724.) Indeed, if a court concludes that the administrative construction is reasonable, it will generally defer to the agency's judgment and uphold its interpretation against challenge. (See *id.*, at pp. 729-730; *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 917, fn. 15 [80 Cal.Rptr. 89, 458 P.2d 33]; *Bodinson v. Mfg. Co. v.*

"(*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.)

"This most recent statement in *Henning* is backed by a solid line of similar holdings about the proper interface between administrative agencies and the judiciary. [Citations omitted.]

"Thus, CDE's point is a simple one: these principles which bind judicial review of agency administrative construction must, by parity of reasoning and policy, apply as well to OAL determinations under Section 11347.5 of the Government Code."

OAL rejects this argument for the following reasons: (1) the argument reflects a simplistic, literal understanding of principles of statutory construction; (2) it is not supported by the *Henning* case; (3) OAL's role in issuing determinations differs from that of the court in deciding cases; and (4) the argument cannot be reconciled with *Armistead*.

*First*, the argument, in part, reflects a simplistic, literal understanding of statutory construction principles. The underlying conception of the pertinent principle seems to be something like "a court must ordinarily defer to an official administrative interpretation of a statute enforced by the agency." The next step in the logic is as follows: since courts must ordinarily defer, OAL must ordinarily defer also--except that the word "ordinarily" is omitted in the rule formulated by the Department to govern OAL's activities.

The Department argues that certain "principles . . . bind judicial review of agency administrative construction. . . ." The Department talks about "the proper interface between *administrative* agencies and the judiciary." (Emphasis added.) This approach overlooks the fundamental point in judicial interpretation of statutes--how best to determine *legislative* intent. Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent and which, when applied, will result in wise policy rather than mischief or absurdity. *Pacific Bell v. California State and Consumer Services Agency* (1990) 225 Cal.App.3d 107, 116, 275 Cal.Rptr. 62, 67. The guiding light is faithfulness to legislative intent, not protection of administrative interpretations.

Whether or not the court decides to go along with the agency's interpretation depends upon the facts of the case and the context of the field of law. The outcome of the case is not determined by mechanical application of abstract deference principles. A veteran California state appellate judge recently praised the opinions of the late Judge Learned Hand, stating:

"Hand's opinions are lucid, eschewing *vacuous generalities that pass for objective rules*, giving the rules of law no more play than justified by the facts and the context of the field of law. As to patent cases [for example], he said, the 'putatively objective principles by which it is so often supposed the invention can be detected are illusion, and the product of unconscious equivocation; the inexorable syllogism which appears to compel the conclusion is a sham.'" (Coleman Blease, Associate Justice, California Court of Appeal,

Third District, "Review: 'Learned Hand, The Man and the Judge,'" Sacramento County Bar Association *Docket*, November 1994, p. 9; emphasis added.)

Following legislative intent is the critical task of the reviewing body.

*Second*, rather than supporting the Department's view, *Henning* presents a case of judicial rejection of an unreasonable administrative interpretation. In *Henning*, the Court declined to follow the state agency's administrative interpretation. The Court recognized that "*in the abstract* a current administrative interpretation would ordinarily be entitled to great weight." (p.288; emphasis added.) Noting that the state agency had earlier followed the opposite interpretation of the statute in question, the Court continued:

"Having considered the matter closely and accorded the IWC the fullest deference justified by the facts and consistent with our obligation to declare the meaning of the law, we believe that [the statute] must be construed to [invalidate the regulation] at issue here and hence that *the Commission's* current *interpretation* of the [statute] *is unreasonable*." (p.288; emphasis added.)

*Henning*, it should be noted, involved invalidation of an interpretation contained in a duly adopted regulation. A lower level of deference is ordinarily appropriate when reviewing an uncodified agency interpretation. *California State Employees Association v. California State Personnel Board* (1986) 178 Cal.App.3d 372, 380, 223 Cal.Rptr. 826, 829. The Department of Education guidelines at issue in the current proceeding, it should be emphasized, have not been adopted pursuant to the APA (after public notice and comment, etc.). That is the problem. Thus, even within the realm of abstract principles, uncodified agency interpretations are at best entitled to a lower level of deference.

*Third*, OAL's role in issuing determinations differs from that of the court in deciding cases. Let us examine a typical lawsuit focusing on a contested statutory provision. Plaintiff says the provision means "A." Defendant says it means "B." Both of these are reasonable interpretations. The court is asked to decide which of the two is "the" correct interpretation. This is a win/lose situation. The court is expected to select the winning interpretation and then draft an opinion justifying this selection. If the selection is not persuasively justified, a higher court may reverse the lower court ruling.

Often a state agency having enforcement responsibilities is a party to one of these lawsuits. This fact calls into play the maxim that a court will defer to the agency's administrative interpretation of the statute, *unless that interpretation is clearly erroneous*. Whether or not the court decides to go along with the agency's interpretation depends upon the facts of the case and the context of the field of law.

OAL's role in issuing regulatory determinations differs significantly from the role of an appellate court in deciding a dispute between two litigants. As noted in the latter *Henning* quotation, the court has the duty and power to "declare the meaning of the

law." The court can authoritatively rule which of two contending interpretations of a statute is the correct interpretation.

OAL's role is more limited and different. OAL cannot declare the meaning of, for instance, an Education Code section. OAL's power is limited to answering the question submitted by, in this case, the Little Hoover Commission. The question is whether or not the agency whose uncodified rule has been challenged has discharged its statutory duty to comply with the conditions laid down by the Legislature in granting the agency quasi-legislative rulemaking power. Agencies do not have *carte blanche* when it comes to implementing legislation. *Carte blanche* is defined as "*unrestricted power to act at one's own discretion; unconditional authority.*" (*The American Heritage Dictionary*, 2d College Ed., 1982, p. 243; emphasis added.) Agency rulemaking authority is restricted in two noteworthy ways: (1) agency rules must be authorized by and consistent with the enabling statute, and (2) these rules must be adopted following the prescribed procedures, including public notice and comment. In issuing determinations, OAL acts to enforce legislative limits on agency discretion.

It may well be that the agency in question could, in a duly adopted regulation, adopt either of two reasonable interpretations of a statute. If the agency submits such a proposed regulation to OAL for review pursuant to the APA, OAL will not "dispute the decision of [the] rulemaking agency to adopt a particular regulatory provision (Title 1, CCR, section 10(a))," even though it is apparent that a different approach could have been taken. So long as the proposed regulation is consistent with and authorized by the statute, "[i]t is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." (Government Code section 11340.1.) (Other applicable legal requirements, such as the 45-day public comment period, must also be met.) We agree with the Department that OAL should defer to the rulemaking agency in one context. In the context of reviewing proposed regulations, OAL should defer to the agency's judgment when the agency has selected one of two or more reasonable interpretations of a statute.

Here, we are faced with a different situation. Here, the Little Hoover Commission has alleged that the Department has dropped the ball, in that the Department has allegedly failed to comply with legally binding rulemaking requirements laid down by the Legislature. OAL is obliged to determine whether or not the Department has indeed dropped the ball. The Department states that when "the agency asserts that it has not illegally interpreted, but merely repeated the law," OAL must defer to this agency judgment. OAL can't do that. This would be like saying, "if you say that you haven't dropped the ball, then you haven't." On the other hand, OAL's determinations concerning the validity of uncodified agency rules are subject to judicial review under Government Code section 11347.5, subdivision (d). The court may modify or set aside OAL's decision. See *SWRCB v. OAL* (upholding OAL determination).

Under Government Code 11347.5, subdivision (b), OAL's task is to "issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order," etc., is a "regulation" as defined in Government Code section 11342, subdivision (b). Further, under Title 1, CCR, section 128 (a duly adopted

regulation), OAL is legally required to "issue a written determination as to whether the state agency rule is a regulation, *along with the reasons supporting the determination.*" (Emphasis added.) For nearly ten years, OAL has implemented this regulation (and the underlying statute), by providing in each determination a legal analysis of agency rules challenged as violative of Government Code section 11347.5. Government Code section 11347.5, subdivision (d) requires OAL to make its determinations known to the Governor and the Legislature, and to make them available to the public and the courts. If all determinations merely said, "the agency says it's not doing anything wrong," these statutory and regulatory mandates would make little sense. Indeed, this would be an absurd interpretation of the APA, treating a number of key provisions as "mere surplusage."

*Fourth*, the Department's argument cannot be reconciled with *Armistead*. Our Supreme Court, in *Armistead v. State Personnel Board*, squarely addressed the state agency's claim that its uncodified rule warranted weight as an administrative interpretation:

"The board argues that, even if section 525.11 is invalid because of APA requirements, it *still merits deference* as an interpretation by the administrators of a rule that needs interpretation.

"A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules. Yet we are here requested to give weight to section 525.11 in a controversy that pits the board against an individual member of exactly that class the APA sought to protect before rules like this are made effective. That, we think, would permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither.

"Under section 11371(b), 11420 and 11440 [now equivalent to sections 11342, subdivision (b), 11346, and 11350, respectively] of the APA, rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA. *Therefore section 525.11 merits no weight as an agency interpretation.* To hold otherwise might help perpetuate the problem that more than 20 years ago was identified in the First Report of the Senate Interim Committee on Administrative Regulations [citation omitted] as follows []:

"The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code [now the CCR].

" . . . The manner of avoidance takes many forms . . . but they can all be briefly described as 'house rules of the agency.'

"They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the

like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.'" (at 205; 4; emphasis added.).

This holding has been followed by the California Court of Appeal in *Engelmann v. State Board of Education*, *Grier v. Kizer*, and *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 236 Cal.Rptr. 853. *Engelmann* is particularly apropos here in that it involved a program administered by the Department of Education. In *Engelmann*, the State Board of Education (represented by counsel for the Department of Education) argued that the APA was not applicable to textbook selection guidelines. One of the points made in support of this argument was that the Court should defer to the Board's "administrative interpretation" that the APA did not apply to textbook selection guidelines. (See note 59.) The Court rejected this argument, stating that it would accord "no significance" to the Board's interpretation. Citing *Armistead*, the *Engelmann* Court said that it would not give any weight to this administrative interpretation because failure to follow the APA was the very problem that the Legislature had sought remedy by enacting the APA.

45. The Department argues:

". . . we reviewed OAL's statutory and regulatory authority, as well as the cases and some of the previous determinations of OAL. Although we do not question the authority of OAL to determine whether or not a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation, as defined in Government Code section 11342(b), we did not locate any statutory definition of what is meant by the phrase, 'implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.' OAL has determined that other agencies have issued guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application and other rules which were regulations because they 'implemented, interpreted, or made specific' the law the agency was administering and that, as a result, those regulations needed to be adopted pursuant to the APA. Accordingly, it is our position that OAL's determinations are regulations which have not been adopted pursuant to the APA because 'implement, interpret, or make specific' the statute which OAL administers. The determinations sought by Mr. Dickstein would likewise constitute regulations in violation of the APA. It is for this very reason that OAL has adopted regulations pursuant to the APA defining 'necessity,' 'nonduplication,' 'authority and reference.' and 'clarity.' (Response, p. 5.)

OAL rejects this argument for the following reasons.

*First*, merely applying statutory criteria in specific cases does not require adoption of a regulation. For instance, the APA does not require the state agency approving institutions authorized to operate teacher credential programs to list the approved institutions in duly adopted regulations. This was the conclusion reached by an opinion of the Attorney General requested by the Superintendent of Public Instruction. 10 Ops.Cal.Atty.Gen. 243, 246 (1947). APA requirements are satisfied if the approval criteria or standards appear in duly adopted regulation, or statute, or both.

Statutes are often self-executing. Agencies are free to apply the statutory standards in specific cases. Only if *additional* standards are developed to supplement the statute is rulemaking required. The fact that statutory terms are not defined does not ipso facto mean that the statute cannot be enforced. As pointed out in the above noted Attorney General opinion, if Government Code provisions lack definitions, "the usual and commonly accepted meanings of the terms must be used." In this determination proceeding, the Department argues that Government Code section 11347.5 cannot be enforced by OAL absent a statutory or regulatory definition of the phrase "implement, interpret, or make specific the law enforced or administered by it. . . ." We disagree. These statutory terms all have usual and commonly accepted meanings. Assuming for the sake of argument that clarification were needed, numerous published appellate opinions have applied these terms in concrete cases.

Indeed, a somewhat similar departmental argument was recently rejected by the California Court of Appeal in *Engelmann*. The Department had contended that a trial court order required it to re-adopt (pursuant to the APA) numerous *statutory* textbook selection procedures and criteria--as well as *uncodified* administrative rules. The Court disagreed, stating that procedures and criteria enacted by the Legislature in statutes did not need to be re-adopted as regulations. (p. 274-75) Only those additional standards developed by the agency were required to undergo APA procedures.

Finally, OAL enforced the statutory "necessity" standard prior to adopting regulations which further defined the term. Adopting a regulation became necessary before supplementary administrative standards could be applied. The statutory requirement was self-executing.

- 46. Page 2, Request.
- 47. Page 3, Advisory 2-89.
- 48. Page 13, Response.
- 49. Page 13, Response.
- 50. Page 14, Response.
- 51. Advisory 89/9-2, p. 5.
- 52. Page 6, Response.
- 53. Page 7, Response.
- 54. Page 8, Response.
- 55. Page 9, Response.
- 56. Page 10, Response.

57. Government Code Section 11342, subdivision (a). See Government Code Sections 11343, 11346 and 11347.5. See also *Auto and Trailer Parks*, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

**1989 OAL Determination No. 4** was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied.

58. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
59. Education Code Section 33031 provides, in part:

"The board *shall* adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, excepting the University of California, the California State University, and the California Community Colleges, as may receive in whole or in part financial support from the state." (Emphasis added.)

In *Engelmann v. State Board of Education, et al.* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, the Third District Court of Appeal addressed the Board's argument that the use of "shall" in Section 33031 contrasted with the use of "may" in another rulemaking section (regarding textbook selection) and indicated that the Legislature intended to exempt the discretionary rules from the APA. The Court summarizes the Board's argument, concluding:

"The board asserts the permissive language of section 60206 relates more specifically to textbook selection, so it controls over section 33031 *and* Government Code section 11346. Finally, since 'nobody' has ever considered the board's procedure for selecting textbooks to be covered by the APA, we should defer to this inchoate administrative 'noninterpretation.' [Citations and footnote omitted]. However, even if we accord significance to the discord between sections 33031 and 60206, viz., that the Legislature did not intend to require the Board to enact regulations to carry out the mandate of section 60000 *et sequitur*, this does not support its conclusion that when it *does* promulgate regulations it is exempted from Government Code section 11346." 2 Cal.App.4th at 57; 3 Cal.Rptr.2d at 270.

The Court concluded this portion of its decision:

"In short, the 'general v. specific' paradigm has no application here. [footnote omitted]. Nor is the 'may' in section 60206 an express limitation of the APA, since it applies only to whether regulations are required, not whether the regulations, if promulgated, must comply with the APA. Finally, we accord no significance to the Board's 'administrative interpretation' that the APA is inapplicable, since that is the very problem the Legislature sought to remedy with the APA." (3 Cal.Rptr. at 272; citations omitted.)

60. Two additional statutory provisions illustrate that the APA *generally* applies to the rulemaking of the Board and Department, and that the Legislature makes express exceptions when it is the Legislature's intention to exempt a particular rule or set of rules from the APA.

Section 33111 provides that "[t]he Superintendent of Public Instruction shall execute, under direction of the State Board of Education, the policies which have been decided upon by the board, and shall direct, *under general rules and regulations adopted by the State Board of Education*, the work of all appointees and employees of the board." (Emphasis added.)

The Legislature further requires, in Section 33127, that the Superintendent, the Controller, and the State Department of Finance shall develop "standards and criteria to be reviewed and adopted by the State Board of Education, and to be used by local educational agencies in the development of annual budgets and the management of subsequent expenditures from the budget." Section 33131 specifically provides that:

"The standards and criteria for fiscal accountability referred to in Section 33127 shall not be subject to Sections 11340 to 11356, inclusive, of the Government Code. However, any standards and criteria adopted by the State Board of Education pursuant to Section 33127 shall be codified and published in Title 5 of the California Code of Regulations."

These provisions make abundantly clear that the agency's rulemaking must generally comply with the APA, unless the Legislature has specifically and expressly exempted a particular subject matter or program from those requirements.

61. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
62. *Supra*, 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.
63. 2 Cal.App.4th 47 at 62; 3 Cal.Rptr.2d 264 at 274.
64. *Id.* at 62; 3 Cal.Rptr.2d at 275.
65. 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891.
66. *Id.*
67. (1993) 16 Cal. Rptr.2d 25 at 28.

68. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
69. Page 3, Channel One Legal Advisory.
70. The Department's claim in the Response that the Channel One news release "merely states a fact" illustrates this point. The Department has labeled the attached document an "executive summary" of a Department "Legal Advisory," but it is "advisory" only in the sense of a warning or statement of intended departmental behavior, not "advisory" meaning an optional suggestion or recommendation.

The word "advise" and its derivative "advisory" have widely varying meanings which range from "to recommend; suggest" and "to offer advice to; counsel;" to the contrasting "to inform; notify;" and even "to caution; warn." See *Webster's New World Dictionary of the American Language*, Second College Edition (Simon and Schuster: New York, 1982). The Department's statement that the "advisory" states a "fact" underscores the intended general application of the policy and the use of the "Advisory" to notify, inform, warn, or caution school districts of the Department's decision not to reimburse schools for time students spend viewing Channel One commercials.

71. Page 3, Channel One Legal Advisory.

72. The Department argued:

"It should be noted initially that in his letter of May 20, 1991, Mr. Dickstein states:

'In your letter of April 22, 1991, to the undersigned, you attached an "Appendix A," purporting to identify each of the documents subject to this Request. Item no. 4 in the Appendix only refers to the Legal Advisory and not the accompanying news release submitted with it.'

"Mr. Dickstein's letter of May 25, 1990, however, *does not* request a determination as to whether the 'news release' of May 25, 1989 constitutes a regulation. In fact, the term 'news release' is not even used in the three-page letter. The letter requests a 'Determination ... that the attached ... Legal Advisories ... constitute regulations ...' Mr. Dickstein only attached one Legal Advisory. That Legal Advisory (89/2) was the subject of the second paragraph of page 2 of Mr. Dickstein's letter of May 25, 1990. Despite Mr. Dickstein's attempt to bootstrap the May 25, 1989 news release by his May 20, 1991 letter, the fact remains that a determination as to whether that news release constituted a regulation was *not* requested by Mr. Dickstein's letter of May 25, 1990; accordingly, it was not identified as being subject to request by OAL's letter of April 12, 1991. It is the CDE's position, therefore, that before OAL can consider the May 25, 1989 news release, a specific request must be initiated. As a result, unless we are informed otherwise by OAL, we shall only address whether Legal Advisory 89/2 constitutes a regulation." Pages 11-12, Response.

73. In addition, the News Release includes the Executive Summary by means of its final paragraph quoted above.

74. In this case, the additional arguments in the News Release only enhance the Department's legal position.
75. Page 13, Response, referring to page 2, Request.
76. Page 13, Response, referring to the final paragraph of page three of the challenged Channel One Legal Advisory.
77. In its fourth argument (at paragraph three, page 14, Response), the Department mentions that Mr. Dickstein "has previously advised the SBE that '... legal and fiscal advisories are outside the scope of [Education Code] Section 33308.5.' Thus, no significance can be attributed to the failure to provide the caution when the section requiring it by Mr. Dickstein's own admission is inapplicable. Certainly this, when coupled with the earlier misstatement of fact [regarding the breadth of the non-reimbursability], does not add up to a 'clearly prescriptive' regulation."

The quote from Mr. Dickstein does not appear in the documents he submitted to OAL in this matter; neither he nor the Department has indicated whether he provided his opinion while acting in another capacity. In any case, the Department is correct in concluding that no significance can be attributed to failure to provide the Section 33308.5 caution. The lack of the prescribed language has no effect *either way* on whether the complete contents of the document are "regulatory" or contain examples, which might or might not be "regulatory," depending on their context. In this case, the material concerning Channel One does *not* appear to "be designed to serve as a model or example" as Section 33308.5 contemplates; rather it flatly prohibits the Department from accepting certifications as to days and minutes spent engaging in a particular activity.

78. Paragraph four, page 14, Response.
79. Page 1, Channel One Legal Advisory.
80. Page 2, Channel One Legal Advisory.

"'Channel One' and similar programs result in the surrender of control over the curriculum to the media and commercial advertisers. Currently, school districts and county offices of education have broad discretion to plan the content of the courses of study offered. Although certain courses are required statewide for graduation, local school districts and county offices of education still have wide discretion over the content of those courses. In addition, local school districts and county offices of education can provide for additional required courses of study. Once one twelve-minute program is substituted into one course of study, where does it end? Will every course of study eventually have a twelve-minute program, two [minutes] of which are commercials? Other than for a nebulous promise from Whittle that neither the program portion nor the commercial portion will be offensive, and that if either are, the principal can blackout [sic] 'Channel One' for that day, all other influence over content is surrendered to Whittle and its commercial advertisers. This very lack of control over curriculum is what the Educational Reform movement has fought to overcome. Dumbed-down textbooks were the result of educators allowing textbook publishers to dictate textbook content. When California refused to adopt textbooks

unless they conformed in content to its heightened expectations, the publishers started producing higher quality materials. Twelve minutes a day for three years of each of our students' time is a high price to pay for some video equipment. In the State Department of Education's (SDE) view, schools should not be in the business of commercial advertising."

81. Page 3, final paragraph of the challenged Channel One Legal Advisory.
82. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 438-39 (two legally tenable ways for Department of Health Services to interpret audit statute). Compare **1988 OAL Determination No. 10** (Department of Corrections), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, p. 2313 (only *one* reasonable way to read prison credit statute) with **1989 OAL Determination No. 15** (Department of Fair Employment and Housing), California Regulatory Notice Register 89, No. 44-Z, Nov. 3, 1989, p. 3122 (two reasonable ways to read statutes applying to pregnancy discrimination claims). See also *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, 16 Cal.Rptr. 727, 751 (when constitutional provision "may well have either of two meanings," Legislature's decision to adopt one of the competing interpretations in statute is "well-nigh, if not completely, controlling").
83. Government Code Sections 11346.5, subdivision (a)(6); 11346.51; 11346.52; and 11349.1, subdivision (d).
84. This simplified calculation does not account for children whose parents request that they be permanently excused from watching the news program, for unexcused absences, or any other variations from the rough averages the Department used for its example. It also assumes that every school adopts the program.
85. Page 1, Channel One News Release.
86. Page 3, Channel One Legal Advisory.
87. Page 1, News Release; page 3, Channel One Advisory.
88. This regulation is in Article 1 (of the Subchapter entitled "Records of Pupils"), which was filed with the Secretary of State on February 24, 1970, effective July 1, 1970. In 1977, an amendment to Section 402 was filed. The only authority cited is Education Code Section 46000.
89. In *Driving School Assn of Calif v. San Mateo Union High School District* (1992) 11 Cal.App.4th 1513, 14 Cal.Rptr.2d 908, Justice Newsom of the First District Court of Appeal discusses whether

"the driver training program actually offered by the School District is consistent with the 'free school' guarantee of the California Constitution. Article IX, section 5, provides: 'The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . . .' The leading case construing the provision, *Hartzell v. Connell* (1984) 35 Cal.3d 899, 201 Ca. Rptr. 601, 679 P.2d 35, concerned the closely analogous question whether a school district can charge fees for participation

in extracurricular activities. The court construed the free school guarantee broadly as extending to all activities that 'constitute an integral component of public education.' [citations omitted]. This broad interpretation, the court reasoned, was required by the legislative purpose of the guarantee to foster 'the making of good citizens.' (*Ibid.*) Holding that the extracurricular activities came within the free school guarantee, the court found that they were 'educational' in character' and that they were offered as an integral part of the public education provided to high school students. [citation omitted]." 11 Cal.App.4th 1513 at 1523-4, 14 Cal.Rptr.2d 908 at 915.

Justice Newsom continued:

"In applying the *Hartzell* decision, we face the initial question whether driver training classes serve an educational purpose like that of extracurricular activities. We note that by declining to extend the free school guarantee to school bus transportation, the Supreme Court recently made clear that, as construed in *Hartzell*, the guarantee applies only to activities that are 'educational' in character. " [We discuss *Hartzell* and following cases in detail below.]

The Court determined that driver training serves an educational purpose like that of the extracurricular activities in *Hartzell* discussed more fully below.

"In our view, the educational character of an activity should be determined in light of the purpose of the free school guarantee of preparing youth for citizenship, and the question whether an activity corresponds to this legislative purpose should be resolved in a manner consistent with the values and judgments implicit in our system of law."

The Court determined that the activity at issue met the "*Hartzell* test of being 'an integral component' of the public education offered high school students within the school district," finding that it supplemented a course given for credit; had an inherent connection as the lab phase of driver education; had a procedural connection because the principal controls student drivers licenses; but especially the Court relied on the factual connection: that classes were made available to students after school and during vacation time; and that the course was mostly taken by students.

90. 18 Ops. Cal. Atty. Gen. 219-220 (1951).
91. 39 Ops. Cal. Atty. Gen. 136 (1962).
92. At page 136. The Attorney General's other conclusions were that: "(3) Both public and private secondary schools excuse pupils from attendance in class to enable them to participate in privately-conducted bowling classes for which fees are charged;" and "(4) A junior college district may not charge fees for bowling classes for which normal credit is to be given."
93. "Section 9, subdivision (k) of title 5 of the California Administrative Code [now the CCR] provides:

'Notwithstanding any provision of this article to the contrary, if for any period of time during a pupil's regularly programmed school day the pupil attends a school sponsored function or engages in a school sponsored activity for which he pays an admission charge or a participation charge, for which period of time no attendance for apportionment purposes may be counted under Education Code Section 11251 or because an admission or participation charge is paid, only his actual attendance upon school or class may be counted for apportionment purposes, and such apportionment attendance shall be computed under subsection (i) of this section.'

"While the construction of this provision is not altogether free from doubt, it carries at least a strong implication that classes for which admission or participation charges are required may not be included in the computation of average daily attendance." 39 Ops. Cal. Atty. Gen. 136 at 138-139.

94. The Department's position as stated in the Legal Advisory seems to reflect this conclusion, assuming, with almost no analysis, that the viewing of commercials is tantamount to charging a fee for an entire class.
95. 39 Ops. Cal. Atty. Gen. 45 analyzes (1) whether the Oakland Unified School District might pay tuition or fees for school personnel to attend sessions conducted by the "Christian Anti-Communist Crusade;" (2) whether the district could adopt a resolution or other endorsement regarding the Crusade; and (3) whether the district would "suffer reduction in state apportionments if students [were] released to attend sessions conducted by the 'Christian Anti-Communist Crusade.'" At page 45.
96. 39 Ops. Cal. Atty. Gen. 45 at 47, *supra*.
97. Derived from Section 3, Article 9, of the California Constitution adopted in 1849.
98. (1918) 37 Cal.App. 638, 174 P. 367.
99. (1984) 35 Cal.3d 988, 201 Cal.Rptr. 601. As taxpayers, a parent and various community groups challenged the school district's imposition of fees on students who wanted to participate in extracurricular activities including drama and music performances and athletic team events. They argued that the fee program violated the "free school" and equal protection guarantees of the California Constitution, that Title 5, Section 350 of the California Administrative Code ("CAC;" now the California Code of Regulations or "CCR") bars such fees, and that state law preempted them.

In the opinion by Chief Justice Rose Bird, the Court held that the fees violated both the free schools clause and Section 350, Title 5, CAC. Four justices, including the Chief Justice, filed concurring opinions, while former Justice Richardson, sitting by assignment of the Judicial Council, filed a dissent. Justice Mosk emphasized the individual benefit of education as "its own reward" as well as the "pragmatic," societal benefits the majority opinion enumerated. With that proviso, he joined in the conclusion "that all aspects of public education are and must remain free." 35 Cal.3d at 919; 210 Cal.Rptr. at 614.

Justice Grodin cautioned against too broad a holding, adding that the extracurricular

activities at issue in this case were all linked inextricably to for-credit classes which were part of the regular curriculum.

Justice Kaus would have preferred to rely solely on the fee policy's clear-cut violation of a valid administrative regulation.

Forcer Chief Justice Bird wrote in concurrence:

"It may come as a surprise to the reader, but I concur fully in my opinion for the court. I write separately to advance an additional argument in support of the holding. In my view the District's fee program violates the equal protection guarantee of the California Constitution." (Footnote omitted).

Finally, Justice Richardson dissented, arguing that California should follow those states which would permit fees for optional participation in extracurricular activities. Interestingly, he would also have held that, since article IX, section 5, of the California Constitution does *not* necessarily prohibit charging fees for certain activities, then the administrative regulation, at least to the extent it rests on the so-called free schools guarantee, is legally inconsistent and therefore invalid.

*Hartzell* describes the history of the adoption of the free schools clause in California and the distinct approaches taken by the few jurisdictions which have construed similar clauses. The Court concludes that mere form alone (whether a course is offered technically for credit or not) should not determine whether a fee is permitted or not, and that the fees imposed in this case do violate the free schools clause.

The Court also holds that the fee program violates Section 350, Title 5, CAC (now CCR), which then, as now, read[s]:

"'A pupil enrolled in a school shall not be required to pay *any* fee, deposit, or other charge not specifically authorized by law.' (Emphasis added [by the Court].)"

The opinion notes that the State Board of Education promulgated this regulation over 40 years ago, "pursuant to its statutory duty to 'adopt rules and regulations not inconsistent with the laws of this state . . . for the government of the . . . day and evening secondary schools.' (Former Pol. Code §1519, now Ed. Code §33031. [footnote omitted])." at 914; 611. This provision still appears unchanged at Section 350 of Title 5 of the re-named California Code of Regulations. It is part of Article 3, entitled "Privileges of Pupils," and carries at the end a note: "Specific authority cited for Section 350: Section 5 of Article IX, California Constitution."

The Court finds that

"This court's holding that the constitutional 'free school' guarantee (Cal. Const., art. IX, §5) prohibits the fees (*ante* . . . ) obviously nullifies any contention that section 350's prohibition against fees for educational extracurricular activities is not mandated by law. However, even if article IX, section 5 is assumed not to bar the fees, it is clear that title 5, section 350's

ban on fees falls well within the State Board's range of discretion.

"To hold, as defendants urge, that administrative prohibitions are valid only when statutory or constitutional provisions independently prohibit the activities at issue would be to eliminate any role for administrative discretion. Here, the State Board--pursuant to its 'general power' to adopt rules for the government of school districts [citation omitted]--has determined that the broad constitutional and legislative policy [footnote omitted] in favor of free schools requires a prohibition on fees for extracurricular activities. No statute or constitutional provision suggests that the State Board is compelled to adopt a narrow, credit-centered view of education. *Rather, the precise relation of noncredit activities to the policy in favor of free public education has properly been left to the expert judgment of the State Board.*" (Emphasis added; 35 Cal.3d at 915; 201 Cal.Rptr. at 611-612.)

The final sentence quoted above appears to capture exactly the task left today to the expert judgment of the Board and the Department in determining the appropriate policy for electronic programs and commercial advertising, within California's statutory, constitutional, and regulatory strictures.

100. The *Hartzell* court discusses the school district's argument in that case that

" . . . the fee-waiver policy for needy students satisfies the requirements of the free school guarantee. They suggest that the right 'to be educated at the public expense' (*Ward v. Flood* [citation omitted]) amounts merely to a right *not to be financially prevented* from enjoying educational opportunities. This argument contradicts the plain language of the Constitution.

"In guaranteeing 'free' public schools, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education--none. [Citations and footnote omitted.] A school which conditions a student's participation in educational activities upon the payment of a fee clearly is *not* a 'free school.'

"The free school guarantee reflects the people's judgment that a child's public education is too important to be left up to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and nonneedy families. . . .

"The free school guarantee lifts budgetary decisions concerning public education out of the individual family setting and requires that such decisions be made by the community as a whole. Once the community has decided that a particular educational program is important enough to be offered by its public schools, a student's participation in that program cannot be made to depend on his or her family's decision whether to pay a fee or buy a toaster." (Emphasis in original; 35 Cal.3d at 911-912; 201 Cal.Rptr. at 609-610.)

101. According to one summary, in challenging a San Jose school's use of Channel One,

"Honig's suit claimed that the programming mandated by the contract 'is the equivalent of either charging those students a fee for their public education or forcing those students to perform a service for Whittle without compensation.' He claimed that the commercials constitute a substantial aggregate loss of educational minutes in school, while teaching students an ideology that 'everything in our society is for sale, even their minds.'" *The Entertainment Litigation Reporter* (Copyright 1992 Andrews Publications) July 27, 1992.

The Department submitted no further analysis of the claim that classroom viewing of Channel One's commercials is the exact equivalent to a fee or uncompensated service. Existing constitutional, statutory, and case law in California do not extend far enough to support the analogy without further legislative or quasi-legislative action.

102. Various news stories suggest that Whittle receives substantial payment for a minute of Channel One advertising time. For example, a story regarding the California State Department of Education's challenge to the San Jose school district showing Channel One, states that "Whittle has provided over 260,000 television sets to schools, and it receives an estimated \$630,000 daily from advertisers whose commercials are shown during the broadcasts." *The Entertainment Litigation Reporter*, July 27, 1992 (Copyright 1992; Andrews Publications).
103. In fact, according to recent studies, the majority of schools taking advantage of Channel One are those with fewer resources. See, for example, a report from November 5, 1993, which stated:

"Poor school districts are 6 times as likely as wealthy ones to receive ad-supported Channel One, according to study commissioned by Unplug, group opposed to commercials in schools. Study said Whittle-owned service is used by 60.5 % of schools spending less than \$2,599 per year per student and only 10.5 % of those spending more than \$6,000." *Public Broadcasting Report*, No. 21, Vol. 15; ISSN: 0193-3663 .

In the trial court proceedings of the recently published California case, *Dawson v. East Side Union High School District* (1994) 28 Cal.App.4th 998, 34 Cal Rptr.2d 108, several groups including the California Hispanic Superintendents' Association, the Association of Mexican American Educators, the League of United Latin-American Citizens, and the Mexican-American Political Association and Latino Issues Forum offered a "Brief of Amici Curiae in support of Defendant East Side Union High School District," supporting the showing of Channel One. The brief states in its introduction:

"This issue ['whether local school districts should be allowed to choose learning resources that they have determined provide valuable educational benefits for their students'] is very important for the Hispanic community. *Local control* over education decisions provides Hispanic educators and parents with the authority to make decisions which will affect the quality of education that Hispanic children receive." Page 1, Brief of Amici Curiae; emphasis added.

Among other factors, the Brief discusses social and economic factors affecting Hispanic students and the decreasing financial support for public education in California. The appellate court saw local control as the crucial issue in the case.

104. "This court recognizes that, due to legal limitations on taxation and spending [citation omitted], school districts do indeed operate under difficult financial constraints. However, financial hardship is no defense to a violation of the free school guarantee. . . .

"Perhaps, in the view of some, public education could be more efficiently financed by peddling it on the open market. Under the California Constitution, however, access to public education is a right enjoyed by all--not a commodity for sale. Educational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers. This fundamental feature of public education is not contingent upon the inevitably fluctuating financial health of local school districts. A solution to those financial difficulties must be found elsewhere--for example, through the political process." 35 Cal.3d at 912-913; 201 Cal.Rptr. at 610.

While the vehement language about "peddling [education] on the open market" certainly suggests that the former Chief Justice might not have approved of the Whittle arrangement exchanging a minimal amount of students' viewing time for educational programs and equipment, nothing in the case requires extending the holding beyond those actual fees which have a differential impact on students, due either to a family's financial circumstances or its [un]willingness to pay.

105. 2 Cal.4th 251, 5 Cal.Rptr.2d 545. *Arcadia* held that Education Code Section 39807.5, on its face, violates neither the free schools clause nor the equal protection guarantee of the California Constitution.

The *Arcadia* Court referred to *Hartzell* as determining that

" . . . extracurricular activities constitute 'an integral component of public education' and are 'a fundamental ingredient of the educational process.'" 2 Cal.4th at 262; 5 Cal.Rptr.2d at 551.

The Court then distinguished the transportation fees from those in *Hartzell* as not related to an essential element of school activity, concluding that

"Transportation is simply not an educational activity. It is not protected by the reasoning in *Hartzell*." at 263; 552.

106. Footnote 7, at 2 Cal.4th 260, 5 Cal.Rptr.2d 550, continues:

"In *Hartzell*, we were considering fees that were imposed by a school district, *which the district had not been authorized by law to impose*." (Emphasis in original.)

107. In *Arcadia*, Justice Mosk dissents, stating that Education Code Section 39807.5 violates the free school guarantee. Relying on *Hartzell* itself as well as earlier California cases and logic, he states:

"[Compared to *Hartzell*], [t]he present case presents even more compelling reasons for finding a violation of the free school guaranty. If the fees in *Hartzell* threatened free schooling by endangering noncredit cultural development, the fees imposed here on school transportation go even further by threatening to abort the educational opportunity itself. In *Hartzell*, discussing low-income families that may not qualify for or be aware of the fee-waiver program, we stated that a student's opportunity to participate in extracurricular activities 'cannot be made to depend upon his or her family's decision whether to pay a fee or buy a toaster.' [citation omitted].

"That pronouncement applies even more strongly to the present case. The very act of sending a child to school should not be foreclosed because the choice comes down to bus fare or grocery money. It is common knowledge that these are difficult economic times, a fact that probably explains why a number of school districts have resorted to charging transportation fees. . . .

"The majority appear to conclude that unlike textbooks or teachers' salaries, 'transportation is not an essential element of school activity.' [citation omitted]. Certainly transportation in and of itself is not essential to education; but transportation *to and from school* is essential to education because it is a prerequisite of it." at 268; 555-556.

Justice Mosk would have found that the statute violates the constitutional free school guarantee.

108. Section 350, Title 5, CCR, states:

"Fees Not Permitted.

"A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law."

109. In dissenting in *Hartzell*, Justice Richardson writes, in part:

"Plaintiffs place their strongest reliance upon an administrative regulation, namely, title 5, section 350 of the California Administrative Code. That regulation, presumably adopted by the State Board of Education pursuant to its general power to 'adopt rules and regulations not inconsistent with the laws of this state' (§33031), provides: 'A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law.' Accompanying that regulation is a note--the origin of which is not specified--which asserts: 'Specific authority cited for Section: Section 5 of Article IX, California Constitution.'

"As previously indicated, however, the constitutional provision cannot be read

to bar the extracurricular activity fee at issue; nor is the fee barred by statute. In my view, a regulation which purports to proscribe activity fees which are neither constitutionally nor statutorily prohibited *would* be 'inconsistent with the laws of this state' and so beyond the power of the state board to adopt. (See §33031)." 35 Cal.3d at 933; 201 Cal.Rptr. at 624-625.

110. The August 16, 1993 bill analysis prepared for the Assembly floor vote summarizes prior legislation as follows:

"Prior legislation. **SB 741 (Torres - 1991)**, would have prohibited school district governing boards from entering into contracts which permit advertisements to be transmitted to pupils by any electronic media during the schoolday. In addition, SB 741 would have prohibited SBE from granting a waiver of these provisions. SB 741 failed passage in the Assembly Education Committee.

"**AB 2009 (Lempert - 1991)** would have prescribed procedures to be followed by school district governing boards that enter into contracts that permit pupil exposure to advertisements from electronic media during the schoolday. AB 2009 was held in the continued Senate Education Committee per the author's request.

"**AB 4078 (Statham - 1990)** would have allowed school districts, with specified restrictions and requirements, to use instructional materials (including materials broadcast through electronic media) that contain advertisements. AB 4078 was held in Assembly Ways and Means Committee.

"**SB 2605 (Torres - 1990)** would have prohibited school districts from entering into contracts that required pupils to view advertisements transmitted by electronic media during the schoolday. SB 2605 was held in the Assembly Education Committee.

"**AB 3908 (Areias - 1990)** would have prohibited school districts from entering into contracts that permitted advertisements to be transmitted to pupils by electronic media during the schoolday. AB 3908 was held in the Assembly Education Committee."

111. The Senate Third Reading Analysis made available for the August 1993 Assembly floor vote provided in part:

"DIGEST [¶] Existing law permits school districts to perform any function which is consistent with the purpose for which they were created, provided the state has not explicitly prohibited or superseded such function by statute.

"Specifically, current law:

"1) Allows school districts to request a waiver of statutory requirements from the State Board of Education SBE.

"2) Prohibits SBE from approving instructional materials which depict products or product logos.

"3) Allows school district governing boards to prohibit the use of bulletins, circulars, or publications as the basis for pupil study, except for textbooks approved by SBE.

"This bill:

"1) Prohibits school district governing boards from entering into written or oral contracts that permit advertisements to be transmitted to pupils by any electronic medium during the schoolday.

"2) Prohibits SBE from granting a waiver of these provisions.

"3) Specifies that the prohibition against advertisements does not include any letter, work, symbol or sign which shows production, sponsorship or underwriting of an education program transmitted by electronic media.

...

"COMMENTS [¶] The purpose of this bill, according to the author, is to prohibit the broadcast of compulsory advertisements in public school classrooms, and to reinforce existing state law that requires that class time be devoted to educational purposes. The author believes that there is no question that classroom instruction can be enhanced by video news programming or exposure to current events, but when such programming is sprinkled with mandatory commercial advertisements, the integrity of the classroom is severely compromised.

...

"Proponents believe the key issue is whether students should be a captive audience for commercial advertisers who are desperate to get young people to develop brand loyalty and purchase products. They believe that the most eloquent testimonial to the faith that advertisers put in the market access provided for in the Channel One contract is the fact that they pay \$150,000 dollars for a thirty-second commercial spot on the Channel One program. They argue that while the appeal for access to electronic technological equipment is strong, this does not mean that our public school classrooms are for sale. They further argue that there are alternatives to Channel One (i.e., CNN Newsroom, The Discovery Channel and C-Span) which offer programs of equal or superior value but without the commercials or contract restrictions.

"Opponents of the bill argue they are interested in providing a current events program for young people and that the Channel One program is an important tool for classroom teachers. They believe that students deserve to experience the utmost in modern technology and educational tools. Without contracting with private enterprises, school districts cannot afford that opportunity. They

further argue that this legislation discriminates against poor school districts and that the decision should be left up to each school board.

"Previous legislation in the 1991-92 Session included SB 741 (Torres) and AB 2009 (Lempert). SB 741 would have prohibited school district governing boards from entering into contracts which permit advertisements to be transmitted to pupils by any electronic media during the schoolday and would have prohibited SBE from granting a waiver of these provisions. SB 741 failed passage in the Assembly Education Committee. AB 2009 would have prescribed procedures to be followed by school district governing boards that enter into contracts that permit pupil exposure to advertisements from electronic media during the schoolday. AB 2009 was held in the Senate Education Committee per the author's request."

112. On May 28, 1993, the Senate refused passage by a 19-19 vote (page 1405). Senator Torres' motion to reconsider was granted. On June 9, 1993, the Senate passed the bill 21-14 (page 1578). On August 23, 1993, the Assembly refused passage 31-41 (page 3521). After granting Assembly Member Eastin's motion to reconsider, on August 30, 1993, the Assembly refused passage of the bill 32-40 (page 3730).
113. When the local school district rather than the state makes the decision, it is plainly a policy (and sometimes, inevitably, an economic) decision rather than one of absolute legal validity. There appears to be no state in which there has been a final determination that state law absolutely prohibits the activity as part of the school program. In New York, it appears to be the firm *policy* of the Board of Regents to disallow the program in public schools.
114. 34 Cal.Rptr.2d 115-116.
115. 34 Cal.Rptr.2d at 118.
116. (1991) 328 N.C 456, 402 S.E.2d 556.
117. The Court found that the contract between Whittle and the schools did not violate Article V, 2(1) of the North Carolina Constitution.
118. Most powerfully, the court concluded:

"We do not find convincing plaintiffs' argument that students are being made to pay for the contract through their time spent in watching the program, and we reject this argument. We conclude that the contract does not violate article IX [remainder of citation to free schools clause omitted]." 328 N.C. at 564.
119. In this case, the State challenged the validity of the local school boards' contracts with Whittle, and the local boards counterclaimed, asking the Court to declare the State School Board's regulation which prohibited these contracts unlawful. The Court held:

". . . Plaintiffs raise three issues on appeal dealing with the constitutionality of the contracts between defendant Whittle Communications (Whittle), and the various local school boards, as well as the validity of the temporary rule

adopted by the State Board of Education concerning these contracts. We conclude that the State Board of Education did not have the authority to enact the temporary rule concerning the Whittle contracts because these contracts involve the selection and procurement of supplementary materials, an area which the General Assembly has specifically placed under the control and supervision of the local school boards. We further conclude that these contracts do not violate the North Carolina Constitution or the public policy of North Carolina." *State v. Whittle, supra*, 328 N.C. 456 at p. 458.

As in California and elsewhere, part of the controversy centers on issues of local versus centralized or state control over certain instructional decisions.

120. Perhaps the greatest difference rests on the North Carolina case cited in *North Carolina v. Whittle, op. cit.*, at 470:

"Plaintiffs also contend that the contract violates the requirement for a 'general and uniform system of free public schools' found in article IX, @ 2(1) of the North Carolina Constitution. According to plaintiffs, the equipment provided by Whittle to the schools is not free because students pay for it with the time they spend watching commercial advertising for Whittle's financial benefit and the benefit of the Channel One advertisers. Citing *Sneed v. Greensboro Board of Education*, 299 N.C. 609, 264 S.E.2d 106 (1980), plaintiffs argue that charging students in time rather than in dollars is per se an unreasonable charge within the meaning of *Sneed*.

"The plaintiffs in *Sneed* contended that the incidental course and instructional fees charged by the local school board violated the constitutional provision requiring free public schools. *Id.* at 612, 264 S.E.2d at 110. This Court concluded that there was 'no constitutional bar to the collecting by our public schools of modest, reasonable fees for the purpose of enhancing the quality of their educational effort.' *Id.* at 610, 264 S.E.2d at 108. The fees involved in *Sneed* ranged from \$4 to \$7 per semester, and the Court viewed these fees as 'reasonable and their burden de minimis.' *Id.* at 617 n.5, 264 S.E.2d at 113 n.5.

"*Sneed* does not provide any authority for the proposition that charging students in time is the same thing as charging them in dollars, and plaintiffs provide no authority for their contention that the students are being 'charged' to watch Channel One by the time they spend watching the program.

"Furthermore, the contract clearly provides that students are not required to watch the program, and the students do not have to 'spend their time' watching the program if they do not wish to do so. Therefore, any comparison to *Sneed* is lost because *Sneed* involved mandatory fees, and watching Channel One is not mandatory. We do not find convincing plaintiffs' argument that students are being made to pay for the contract through their time spent in watching the program, and we reject this argument. We conclude that the contract does not violate article IX, @ 2(1)."

While North Carolina differs sharply from *Hartzell* in its acceptance of *de minimis* fees, its rejection of the alleged parallel between outright fees for participating in school activities and the "charge" of "mandatory" viewing of Channel One (or its commercials) is instructive.

121. The Sixth Circuit Court of Appeal affirmed a lower court ruling in *Wallace v. Knox County Board of Education* reported in table case format at 1 F.3d 1243 (Sixth Cir., 1993) dismissing the Wallaces' request for relief objecting to the showing of Channel One in the son's classroom.

The Court rejected the claim that the school's showing of Channel One programming violated the First Amendment's Establishment Clause or that because it was not "educational," the school could not show it. The school did not provide alternative activities for students objecting to viewing it, although it did excuse them from viewing the program. The Sixth Circuit Court of Appeal did not find its entire opinion suitable for publication, and the case is somewhat of an oddity.

Interestingly, the attorney representing the East Side Union School District in San Jose, California, stated that she intended to use the U.S Constitution's Free Exercise clause *to support* the schools' right to continue showing Channel One. (As quoted by *The Recorder*, July 2, 1992, Thursday, on page 1, "School Looks to Heavens In Channel One Battle." Copyright 1992 American Lawyer Media.)

122. Office of the Attorney General of the State of Arizona, 1990 Op. Ariz. Atty Gen. 101, issued July 17, 1990:

"You have asked whether school district governing boards (school districts) may contract with a private for-profit entity to show daily to high school students a twelve minute video newscast, which is interspersed with two minutes of commercial advertising. Specifically, you refer to school districts contracting with Whittle Communications' Education Network to show Channel One programming during the school day. We conclude that school districts have such authority."

...

"We conclude, therefore, that school districts may to [sic] enter into contracts with a private entity to show a daily video newscast, which includes commercial advertisements as part of the school district's prescribed course of study."

...

"Although we find statutory authority for school districts to enter into such agreements, we note that other issues related to the agreement should be addressed by the school district.

"First, a school district as a public entity has a fiduciary obligation to obtain maximum return for each dollar spent. [citation omitted]."

"Second, the school districts are required to adopt policies on parental involvement in the schools, including access to and review of materials and procedures for withdrawal of their children if they object to learning material as harmful."

.....

"Thus, we conclude that school boards may enter into the described agreements, subject to proper exercise of the boards' fiduciary and parental access obligations."

123. The Office of the Attorney General of the State of Kentucky, 1990 Op. Atty Gen. Ky., OAG 90-42, issued June 11, 1990, provides in part:

"Furthermore, the courts have held that determination of an educational purpose is a matter of opinion, and unless the particular expenditure is extreme, or clearly not educational, the legislature has the right to declare what constitutes an educational purpose. [citation omitted].

....

"Based on the case law and on the opinions previously issued by this office, it is our conclusion that the news programs presented by Channel One fall within the definition of an educational purpose. The television news programming, clearly, is not incidental to education where the content of the programming addresses such core areas of curriculum as geography, history and current events. The fact that commercials are included for two out of twelve minutes of the programming does not change that conclusion. It is the educational purpose of the programming as a whole that must be assessed; in this case, the commercials constitute such a very small proportion of the programming that the educational purpose of the programming as a whole must be seen as educational. Also, the agreement to participate in Channel One would be directly under the control of the state or local board of education or school council.

"Because the news programs at issue in this matter have an educational purpose, the use of these news programs in the public schools would not be prohibited by Sections 184 and 186 of the Kentucky Constitution or by KRS 160.580. Moreover, we know of no other constitutional or statutory provision that would prohibit the use of these news programs in the public schools.

....

"Therefore, our opinion is that existing law does not prohibit, outright, local school districts from showing instructional TV programming with minimal commercials included."

The Kentucky Attorney General then responded to a second question of particular

relevance to the issue posed by the Department's pronouncement regarding reimbursement:

"2. If instructional TV programming with commercials included is allowed in the public schools, should the two minutes of commercial programming be excluded from the six hour day?"

...

"Based on OAG 76-592, discussed above, it is our determination that the news programs do constitute a legitimate educational purpose and that the two minutes of advertisements, from a legal point of view, may be considered de minimus [sic]. Accordingly, if instructional TV programming with commercials included is allowed in the public schools, then from a legal standpoint, it would not be required under Sections 184 and 186 of the Constitution to exclude the two minutes of commercial programming from the six hour day. This determination becomes, therefore, a matter of policy which the State Board may address."

The final question is:

"3. Does the State Board have authority to ban any television instruction with commercial advertising if the board determines, as a matter of public policy, that such should not be utilized in the classroom?"

The opinion then reviews the evolution of Kentucky school governance as control has become increasingly centralized, concluding:

"Based on the above discussion, it is our opinion that the State Board has the authority to ban television instruction with commercial advertising if the board determines, as a matter of public policy, that such should not be utilized in the classroom. . . . In addition, it is our opinion that the State Board also has the authority to allow this issue to be resolved at the local school board level."

...

"In summary, it is our opinion that the State Board has the authority either to ban television instruction with commercial advertising from the public schools or to allow a decision regarding that issue to be made at the local school board level.

"While there are policy arguments to be made both in favor of and against the showing of educational news programs sponsored by advertisers, it is not the role of this office to make public policy but to define what is permissible under the law. Policy decisions remain the purview of the legislature and of those public bodies or political subdivisions to which it has granted discretion. [citation omitted]."

The opinion goes on to summarize, without advocating, various of the policy

arguments for each position:

"We note for your information that there are policy arguments for both sides. Arguments against the program include the idea that it involves selling access to children's minds, that the program would result in over-commercialization of the schools which contain a captive audience due to the compulsory attendance rules. Others have maintained that providing commercial television in the schools suggests endorsement for the products, or may result in sponsors controlling the content of the programs. Some have pointed out that the television news is not screened in the same manner as other instructional materials. There have been charges that television lures children away from books, and that to provide commercial television in schools is hard on students who live in poverty and have no hope of being able to acquire the products that they are encouraged to buy, and even that children who are encouraged to buy brands may be at risk in areas where owning popular items may make them subject to robbery or personal danger. Some would complain that if the principal tells teachers to show the program, the teachers have lost discretion in the area of instruction, while others argue that it is not good to take away class time for commercial material.

"Policy arguments in favor of the program have emphasized that there is a great need for resources in our schools, which for various reasons have not been forthcoming. Mr. Chris Whittle of Whittle Communications admits that in an ideal world it would be good to provide all equipment and programs without advertising, but that advertising makes this offer possible. Proponents state that the programming is a good and effective learning aid, combining well with instructional material already on hand and enhancing cultural literacy among an age group that traditionally does not read or watch the news and has little knowledge of geography, of political events or of their relevance. Others have pointed out that it is important for the private sector to work with schools in that the private sector experiences the direct result of our educational process and has experienced difficulty in finding qualified applicants for positions. Many educators have pointed out that commercial influences have existed in school systems for years, and that there is no material difference between providing two minutes of television advertisement on a twelve minute tape and in providing written materials that contain advertisements free or at a reduced rate, posters, electronic scoreboards, vending machines, commercially sponsored film strips, or allowing corporate sponsorship of athletic events in return for concession rights. Moreover, teachers have testified that students who have watched Channel One have improved in their knowledge of geography and their knowledge of world events and their relevance.

"Other issues include whether decision making should be on a state level or local level, in central office or in the classroom; the proper balance between private participation in the public sector; the willingness and/or ability of taxpayers to provide the recommended equipment to the schools versus accessibility from the private sector; and the role of leaders of private business versus the role of educators.

"An additional consideration for policy makers concerns current resources. . . . "

This thorough opinion describes many parallels to the state of the law (and policy) in California, although, of course, details of the specific state legal provisions differ.

124. The Louisiana Attorney General issued its Opinion No. 90-120, 1990 La. AG 102, on March 23, 1990. In a wonderfully brief opinion, the Attorney General opines that, without approval by the State Board of Elementary and Secondary Education ("BESE" or "Board"), a parish school cannot use live television programming like that of Whittle Communications' Channel One, which includes commercial advertising, as instructional material. He notes:

"While you object to this program on a policy basis, you limit your opinion request to a consideration of whether this contractual arrangement violates pertinent state law."

The opinion acknowledges the general supervisory authority of the Board over educational programs and selection of educational materials; the legislative mandate that

"the minimum school day for all public school students in Louisiana shall be three hundred thirty minutes of instructional time, exclusive of all recesses. [citation omitted] The minimum session of attendance is 180 school days. [citation omitted] Finally, the legislature has mandated that all audio-visual instructional materials be 'thoroughly screened, reviewed and approved as to their content' by BESE. [citation omitted].

The Louisiana Attorney General concludes:

"Films, videotapes, live television and the other expressions of the 'information revolution' we are currently experiencing have a new and powerful role to play in the educational process. Even theatrical films in their dramatic presentation of historical events ('Glory,' 'Gandhi') can make provocative and valuable contributions to the learning process. Yet until the legislature decides otherwise, the use of these types of materials for instruction is subject to the review, supervision and control of BESE. Without such review and approval, the use of the Whittle Network programming not only violates R.S. 17:352 [the screening, review and approval provision], and Art. VIII, Sec. 3(A) [the constitutional provision establishing the BESE's supervisory and other duties and powers] but also the statutes governing minimum instructional time for a school day and minimum school days, as the broadcast would not qualify as legally valid instructional time.

"Further, we know of no provision of law which authorizes a parish school board to condition any instructional program upon the student's involuntary viewing of commercial advertising, which inures to the profit and economic gain of a private enterprise. A free public education is a constitutional right.

The Constitution ordains that it shall be provided for by the legislature, and not for profit by private enterprise. La. Const. Art. VIII, Sec. 1 (1974).

"Undoubtedly the Caddo Parish School Board has acted in good faith in this instance to provide exposure to current events to high school students. However, the means chosen is ultra vires. The school board, unless approval is obtained from BESE for their arrangement with Whittle, will have to rely upon the more traditional method of teaching current events, which requires an intelligent and provocative human being and a map."

Unlike those of some of the other states, this opinion of the Louisiana Attorney General does not rely on the free schools guarantee. It clearly envisions that the BESE *could* authorize Channel One following the statutorily required review, until such time as the Legislature delegates the selection of instructional materials, including audio-visual ones, to the parish school boards.

The opinion holds that the *local* school district acted beyond its authority in contracting for Channel One programming. However, it indicates no legal reason that the *State Board* could not permit Channel One viewing in classrooms, or that the Legislature could not delegate to the local districts the responsibility for deciding whether or not to show Channel One.

125. Office of the Attorney General of the State of Utah, Opinion No. 92-31, 1993, issued April 6, 1993:

In brief, the opinion concludes:

"This letter is in response to your inquiry of September 30, 1992, regarding the propriety of a school entering into an agreement to use Channel One in the schools. Your precise questions are:

"May a school district enter into a contract for the use of Channel One in the schools, and if so, must provisions be made to excuse students who do not wish to view the commercial messages?

"Yes, a district may enter into a contract for use of Channel One if the contract is duly approved by the local board of education, and students who do not wish to view the commercial messages should be excused and directed to alternative school activities."

In more detail, beginning with Question No. 2, the opinion proceeds:

"If a school district may contract for use of Channel One in the schools, must provisions be made to excuse students who do not wish to view the commercial message?

"Response No. 2. Yes. Where a teacher gives an assignment for credit, the assignment should be structured to avoid compelling a student to view commercial messages on a regular basis. In other words, a student should be

excused from viewing unwanted commercial messages. The one reported case upheld a school district's discretion to air Channel One where viewing was voluntary. *State v. Whittle Communications*, 402 S.E.2d 556 (N.C. 1991). Of course, if the subject of an assignment is directly related to the commercial message, as might be the case in a course which addresses the psychology or structure of advertising, then viewing of Channel One may be made a relevant but occasional part of the required school day curriculum. [note 1]

*"[note 1] I have not addressed parental consent because my opinion is that Channel One generally cannot be shown during regular required coursework for credit. In the event a teacher determines that Channel One is relevant and should be shown regularly on an ongoing basis, the teacher or district would be well advised to give notice to and obtain the consent of parents so that voluntariness of viewing commercials is without question.*

"Occasional viewing of Channel One commercials should be treated just as any other passive advertising allowed by school officials which is incidental to the mission and operation of the schools. There is no reason to limit the discretion of school authorities to allow proprietary soft drink vending machines or to give some recognition for donations of money, time or property. [Examples omitted]. If such recognition can be viewed as advertising, it is passive in that it does not require the forced attention of students in the classroom as an apparent part of coursework for credit. On one hand, passive advertising is not apparently endorsed by being taught for credit and requiring attendance; students are free to acknowledge the recognition for whatever it is worth. On the other hand, assessing a failing or incomplete grade to a student who refused to watch commercials in a course for credit would likely be difficult to sustain against a court challenge.

"A related question arises as to whether a district can use Channel One in regular classes taught for credit where attendance is required.

"The general curriculum courses of study and standards for graduation are set by the State Board of Education [citations, exposition omitted].

"According to my information, Channel One generally has been shown during the last minutes of a required course. It is expedient to show the program at one time during the school day for all the students while the students are still in class so an adequate audience is ensured. Channel One usually is not selected by either the students or teachers because of its relevance to some portion of the curriculum, such as a current events assignment, and the teacher typically has not had the opportunity in advance to review or assess its educational value or relevance. Channel One presentations in classrooms instead result from an administrative decision to inject a program into a regular course on a daily basis as a result of a contractual obligation to provide an audience in exchange for equipment for the school. *Thus it appears that the Channel One program is not part of the curriculum or course of study required or approved under the guidelines and rules of the State Board of Education and therefore may not be substituted for part of the coursework on a*

*regular ongoing basis.*

. . . .

"In Utah it appears that the constitutional and legislative intent is to allow the State Board of Education to maintain general control and supervision over the schools, including the establishment of minimum standards for courses taught in the schools. To then allow the district *on a regular basis* to substitute possibly irrelevant and non-instructional materials during the regular school day appears to be contrary to that intent and beyond the authority of the district.

"In the one reported court decision found by our research, a Whittle Communications contract for Channel One with a North Carolina school district was upheld. [citation omitted]. In that case, state law expressly authorized a local school district to select 'supplementary instructional material' for the classroom, and the contract expressly provided that students could be excused so they would not 'spend their time' watching Channel One if they did not wish to do so. But in Utah the State Board sets the standards for course instruction and determines compliance. Another difference is that viewing of Channel One in Utah generally has not been voluntary.

"This is not to say that teachers may not from time to time use a current events program or assign a book, magazine, television program, newspaper article or other information not specifically approved by the State Board, which incidently exposes a student to some advertising. The compulsory education law, however, cannot be used to provide an involuntary captive audience on an ongoing basis during regular class time for the express purpose of direct and regular commercial solicitation; to do so is at least indirectly coercive, in my opinion. [note 2]

*"[note 2] A local school board cannot require regular viewing of Channel One as 'current events' because it is direct commercial solicitation. There are various alternatives which provide such information without direct advertising. In the North Carolina case, in a vigorous dissent, one judge characterized Channel One programming as unnecessary non-instructional entertainment and seriously questioned the authority of a school board to allow (much less require) Channel One in any education program. [citation omitted]. The continuous regular use of a single source for information would likely constitute an implied endorsement of the source and content. Where such information has not been approved by the State Board of Education, its regular use and endorsement is likely beyond the authority of the local board.*

"Incorporation of commercials into regular school coursework has been criticized by California state school officials. In a recent unreported California case, state school officials obtained a permanent injunction against compelling public school students to view Channel One. [citation omitted].

"In the California case, state officers contended that showing Channel One to a

captive student audience had no valid educational purpose, but instead amounted to the sale of minds of students to Whittle Communications in exchange for equipment for which the district otherwise would have to pay in dollars. Defendants asserted that Channel One was a unique and valuable educational tool that allowed the district to gain additional financing, and that viewing was voluntary according to terms of the contract.

"The court recognized the serious financial plight of the school district which prompted the district to develop creative methods of funding education. The court was also concerned about the possibility of indirect coercion of teachers and students in the absence of appropriate safeguards. The court's view was that any coerced or involuntary viewing would be inconsistent with California's compulsory education law. In other words, the active direct commercial solicitation by involuntary viewing of commercial material in the classroom would be an abuse of local district discretion.

"The court then issued a permanent injunction against showing of Channel One in the classroom during hours when students are required to be in class, except under conditions that 1) student viewing of Channel One is strictly voluntary, 2) a structured supervised alternative is to be provided for students not wishing to view Channel One, 3) written notice of the showing of Channel One must be given to parents who may elect that their child not view Channel One, and 4) a student's standing with the teachers or school cannot be adversely affected by a decision to not view Channel One. [Citation omitted]

"Conclusion[:] [¶] A school district may contract with Whittle Communications for use of the Channel One programs in schools provided the agreement is 1) approved or ratified by the local board of education, and 2) the Channel One program is not substituted during class time for regular coursework for which credit is given and attendance is required.

"If a teacher wishes to incorporate Channel One as relevant to the subject matter of a particular course and assign viewing of Channel One for credit in the course, the teacher should excuse any student who does not wish to view the commercials from at least that portion of the assignment. A student so excused should be assigned a reasonable alternative activity." (Emphasis added.)

126. *The New York Times*, Associated Press, Dateline: Trenton, New Jersey, August 6, 1992. The article continued:

"Mr. Ellis, [the Commissioner] who has the right to overrule administrative law judges, acknowledged that the commercials pose 'troubling questions,' but said the Trenton case was not in violation of state law. Noting that the broadcasts in the local city schools were shown during homeroom, not during classroom time, Mr. Ellis said they did not intrude on time usually reserved for instruction. He also noted that students who did not wish to watch the broadcast were accommodated in another classroom."

127. *The New York Times*, August 10, 1992.
128. Apparently the satellite transmission is not available in Alaska and Hawaii, and New York has banned Channel One by order of its Board of Regents. ("According to Whittle, New York is the only one of the 48 contiguous states that does not allow Channel One. Except for Hawaii and Alaska, which cannot receive the satellite-delivered service, 8 million students in 12,000 high schools are able to view Channel One." *Education Technology News*, July 6, 1993, No. 14, Vol. 10, "New York Bans Channel One From its Classrooms." The New York State Legislature has refused to overturn the ban.

California appears to be the only other state with a very small (fewer than 200) enrollment of public schools, possibly due to the Superintendent's position with respect to ADA reimbursement.

129. In contrast, some legal aspects of the Channel One controversy *do* emerge as clear. For example, if a school *does* choose to broadcast Channel One in the classroom, it must make alternative provisions available for those students who do not choose to watch it.
130. Chapter 7 of Part 27 of Division 3 of Title 2 of the Education Code.
131. Education Code Section 49164 provides in full:

"Permits to work and to employ and certificates of age shall always be open to inspection by supervisors of attendance, probation officers, designees of the Labor Commissioner, and by officers of the Superintendent of Public Instruction. Every permit to work or to employ and every certificate of age shall be subject to cancellation at any time by the Superintendent of Public Instruction, the Labor Commissioner, or by the person issuing the permit or certificate whenever any person authorized to inspect such permits and certificates finds that the conditions for the legal issuance of the permit or certificate of age do not exist or did not exist at the time the permit or certificate was issued. A permit to work shall be revoked by the issuing authority when he is satisfied that the employment of the minor is impairing the health or education of the minor, or that any provision or condition of the permit is being violated, or that the minor is performing work in violation of any provision of law."

132. Education Code Section 49162 provides in full:

"The employer of any minor subject to this chapter shall send to the officer authorized to issue the permit to work a written notification of intent to employ a minor. The form of the intent to employ a minor shall be prescribed by the Department of Education and shall be furnished to the employer by the officer."

133. Education Code Section 49163 provides in full:

"The notification of intent to employ a minor shall contain:

"(a)The name, address, phone number, and social security number of the minor.

"(b)The name, address, phone number, and supervisor at the minor's place of employment.

"(c)The kind of work the minor will perform.

"(d)The maximum number of hours per day and per week the student will be expected to work for the employer.

"(e)The signatures of the parent or guardian, of the minor, and of the employer."

134. Education Code Section 49117 provides:

"All permits to work or to employ, all certificates of age, and certificates of health pursuant to this chapter, shall be issued on forms prepared and provided by the Superintendent of Public Instruction. Local school districts authorized to issue permits to work may be authorized by the Superintendent of Public Instruction to produce permits to work."

135. Education Code Section 49115 provides in full:

"The permit to employ shall contain:

"(a)The name, age, birth date, address and phone number of the minor.

"(b)The place and hours of compulsory part-time school attendance for the minor, or statement of exemption therefrom, and the hours of compulsory full-time school attendance for the minor, if the permit is issued for outside of school hours.

"(c)The maximum number of hours per day and per week the student may work while school is in session.

"(d)The minor's social security number.

"(e)The signature of the minor and the issuing authority.

"(f)The date on which the permit expires."

136. Chapter 82, Statutes of 1989, (Senate Bill 98, Hart) enacted as an urgency statute. The quoted language is from Section 39. The Legislature enacted identical language in Section 38, Chapter 83, Statutes of 1989 (Assembly Bill 198, O'Connell).

137. Section 24, Chapter 82, Statutes of 1989, added "Article 9. 'Supplemental Grants'" to Part 29 of the Education Code, Sections 54760 and 54761. (Section 24, Chapter 83, Statutes of 1989, added the same "Article 9.") Education Code Section 54760 (1) states the Legislature's intent, including both the program goals and the requirement that it be funded in the Appropriations Act for specified years; and (2) establishes the grants.

Education Code Section 54761 does the following:

- (1) mandates the Superintendent of Public Instruction to provide the supplemental grants;
- (2) specifies the method of calculating the grants, including identifying the categorical programs, funding for which goes into the funding formula;
- (3) sets out the timetable for the calculations and apportionments;
- (4) describes how to reduce the apportionments if appropriations are insufficient to meet the amounts computed by the required method;
- (5) Makes supplemental grant funds part of the base funding of each school district; and
- (6) requires school districts to deposit the funds in a restricted account, and expend that money only for the enumerated purposes.

- 138. Page 1, Supplemental Grants Advisory 89/9-2.
- 139. Page 1, second Supplemental Grants Advisory, No. 89/9-5.
- 140. Pages 1-2, Supplemental Grants Advisory 89/9-2.
- 141. Page 1, Supplemental Grants Advisory 89/9-2.
- 142. Education Code Section 54760 provides for funding for school districts that receive less than average funding. Section 54761(a)(4) provides for the \$100 maximum per student (as represented by ADA). Section 54761(a)(3) provides for the calculation of the statewide average by size and type of school district for the comparison in subdivision (a)(4).
- 143. Education Code Sections 54761, subdivision (e), and 54760.1. This conclusion assumes that Appendix A lists the 26 programs which Education Code Section 54761(a)(1)(B)(i) lists plus the School-Based Management and Advanced Career Opportunities for Classroom Teachers Pilot programs added by Statutes 1989, Chapter 1282, at Section 54760.1. The parties have not supplied OAL with Appendix A.
- 144. Section 54761, subdivision (e) provides in part that Supplemental Grants funds
 

" . . . shall be expended . . . only for the purpose of funding one or more of the programs enumerated in clause (i) of subparagraph (B) of paragraph (1) of subdivision (a) [the 26 categorical programs]."

The Department seems to have read this section *as if* it stated:

" . . . shall be expended . . . only for funding *the general purposes of* one or more of the programs enumerated . . . . "

This language would have been quite similar to that of the "sunset provisions" found at Education Code Section 62002 requiring that funds be used "for the general [. . . or] intended purposes" of the [sunsetting] program . . . . " The Legislature did *not* use the same language in Section 54761, subdivision (e).

- 145. Education Code Section 54761(d) provides that "[f]unds appropriated pursuant to this article shall be part of the base funding of each school district."

146. Education Code Section 54761(a)(1)(B)(i)(I)-(XXVI).
147. Pages 2-3, Supplemental Grants Advisory 89/9-2.
148. Education Code Section 54761(a)(1)(B)(ii)(I)-(V) *excludes* specified programs from Supplemental Grants calculations.
149. Education Code Section 54761(b)(1) requires the 75 % apportionment at the time of the first principal apportionment of the current fiscal year. Subdivision (e) requires that the districts deposit the funds in a restricted account, and that they spend the funds only for the enumerated programs.
150. Education Code Section 54761(b)(2).
151. Education Code Section 54761(c).
152. Pages 3-4, Supplemental Grants Advisory 89/9-2.
153. Education Code Section 54761, subdivision (e) provides:

"All grant funding apportioned under this article to any school district shall be deposited . . . into a restricted account, and shall be expended from that account only for the purpose of funding one or more of the programs enumerated in clause (i) of subparagraph (B) of paragraph (1) of subdivision (a) [listing the 26 categorical programs]."
154. The *American Heritage Dictionary* defines the word "should" as "the past tense of *shall*. 1. Used to express obligation or duty." (Second College Edition, Houghton Mifflin Company, Boston: 1982.) The usage comment notes that "[i]n traditional grammar the rules governing the use of *should* and *would* were based on the rules governing *shall* and *will*. In modern times and especially in American usage, these rules have been greatly eroded, even more in the case of *should* and *would* than in the case of *shall* and *will*."
- Black's Law Dictionary* defines "should" as "[t]he past tense of "shall;" ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from "ought." It is not normally synonymous with "may," and although often interchangeable with the word "would," it does not ordinarily express certainty as "will" sometimes does." (Sixth Edition, West Publishing Company, St. Paul, Minnesota: 1990.)
150. Page 1, second paragraph, Advisory 89/9-5.
151. Page 4, Advisory 89/9-2; page 2, Advisory 89/9-5.
152. 73 Ops.Cal.Atty.Gen. 330, issued October 25, 1990. The request was from Assembly Member Jack O'Connell, the author of Assembly Bill 198, Chapter 83, Statutes of 1989, which established the Supplemental Grants Program, among others.

153. It is interesting to note that in the Budget Act of 1990, filed with the Secretary of State on July 31, 1990, the Legislature explicitly stated that:

"1. School districts shall not be required to maintain prior-year levels of local expenditures for those program purposes on which supplemental grants are spent as a condition of receiving these funds."

This language appears at Item 6110-108-001, Chapter 467, Statutes of 1990. Although the Advisory pre-dates this legislative statement, the Attorney General issued this opinion several months after the Budget Act became effective.

154. *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-1387. See discussion at 73 Ops.Cal.Atty.Gen. 332 (1990).
155. The Attorney General relies heavily on the need to avoid an implied repeal of Education Code Section 42600 regarding the transfer of unrestricted funds among educational programs. One need not reach this question to determine whether there is more than one way to interpret the Supplemental Grants Program statutes.
156. After determining that the statutes do not require districts to maintain their "prior level of unrestricted funding for the enumerated programs" (at p. 333), the Attorney General discussed whether the Department has the authority to impose such a condition. The opinion found that:

" . . . the Department's Program Advisory conflicts with the provisions of sections 54760-54761. It alters, amends, and enlarges the statutory language by requiring the prior use of unrestricted funds for the specified programs to continue. The statutes do not impose such a condition. Hence the Department has no authority to do so." *Ibid* at 335.

The Attorney General did not address the Department's rulemaking authority or power to implement, interpret, or make specific the statutes it administers. Government Code Section 11347.5 prohibits state agencies from interpreting their governing statutes without using the appropriate rulemaking procedure; Government Code Section 11342.2 provides in part:

" . . . no regulation adopted is valid or effective unless consistent and not in conflict with the statute [it implements] and reasonably necessary to effectuate the purpose of the statute.

We need not determine whether the Department's interpretation would have exceeded the scope of the regulation in order to determine whether a regulation would have been needed to interpret the statute. One of the benefits of the APA process, including soliciting public comments and undergoing the OAL legal and procedural review, is the opportunity for resolving issues such as whether a particular regulation interprets a statute or improperly enlarges upon it.

157. The Attorney General's opinion cites Education Code Section 42600 which permits school districts ordinarily to transfer funds from one program to another after following specified procedures. 73 Ops.Cal.Atty.Gen. at 331-332.

158. For example, Education Code Section 54001 regarding the administration of programs for educationally disadvantaged youth provides in part:

"Nothing in this chapter shall in any way preclude the use of federal funds for educationally disadvantaged youths. Districts which receive funds pursuant to this chapter shall not reduce existing district resources which have been utilized for programs to meet the needs of educationally disadvantaged students."

In contrast, with respect to Economic Impact Aid, another categorical program, the Legislature provided, at Education Code Section 54020:

"It is the intent of the Legislature that funds authorized pursuant to this chapter replace, as of July 1, 1979, funds previously authorized to support educationally disadvantaged youth programs and bilingual education. To that end, the purpose of this article is to provide a method of impact aid allocation . . . which will allow efforts initiated under those programs to continue and expand so long as need exists while previously unserved and underserved populations are provided with adequate aid."

159. Page 2, Supplemental Grants Advisory 89/9-5.

160. The Department may have regulations or standards elsewhere which contain some or all of these requirements with respect to accounting for other categorical grant funds. We cannot determine whether those underlying requirements are in properly adopted regulation or in unadopted manuals and guidelines. However, defining the Supplemental Grants funds as another similar program and subjecting them to the requirements which apply to the other categorical program funds *is* a regulatory act, regardless of the status of the accounting requirements themselves.

161. As noted above,

" . . . if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697 at 702; 16 Cal.Rptr.2d 35.

162. Program Advisory 87/8-2 covers the following five programs listed to sunset in Education Code Section 62000.2, which was added by Statutes of 1986, Chapter 211, as follows:

"The following programs shall sunset on June 30, 1987:

- (a) Miller-Unruh Basic Reading Act of 1965.
- (b) School improvement program.
- (c) Indian early childhood education.
- (d) Economic impact aid.
- (e) Bilingual education."

Statutes of 1989, Chapter 1183, Section 9, removed the Indian early childhood education program from this listing and "reactivated" that program as discussed *infra*.

Education Code Section 62000, as it appeared at the time the Department issued this Advisory, provided:

"'Sunset' and 'sunset date,' as used in this part, mean the date on which specific categorical programs cease to be operative and Sections 62002, 62003, 62004, 62005, and 62005.5 govern program funding.

"The educational programs referred to in Sections 62000.1 to 62000.5 inclusive, shall cease to be operative on the date specified, unless the Legislature enacts legislation to continue the program after the review prescribed in Section 62006." (Amended by Statutes of 1991, Chapter 223, which changed the section references in the second paragraph to "in *this part*.")

163. Page 2, Program Advisory 87/8-2.

164. Page 2, Sunset Advisory.

165. Page 2, Sunset Advisory.

166. Page 3, Sunset Advisory.

167. Education Code Section 62002.5 provides:

"Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, *shall continue* subsequent to the termination of funding for the programs sunsetted by this chapter [Chapter 1 of Part 34, 'Evaluation and Sunsetting of Programs']. *The functions and responsibilities of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979.*" (Emphasis added by Department.)

168. Page 3, Sunset Advisory.

169. When the Department published its Advisory in 1987, Education Code Section 62000 provided in part that

"'Sunset' and 'sunset date' as used in this part, mean the date on which specific categorical programs cease to be operative and *Sections 62002, 62003, 62004, 62005, and 62005.5 govern program funding.*" (Emphasis added).

(In 1991, the second paragraph, not quoted above, was amended to change "educational programs referred to in *Sections 62001.1 to 62001.5, inclusive*" to the "educational programs referred to in *this part*.")

170. Request, page 2.

171. Page 4, Sunset Advisory.

172. Page 4, Sunset Advisory.
173. It refers to the "three basic steps a school must follow to participate in the School-Based Program Coordination Act," set out later in this Advisory and discussed later in this analysis. Pages 4-5, Sunset Advisory.
174. Page 5, Sunset Advisory.
175. Education Code Section 33050.
176. Page 5, Sunset Advisory.
177. In fact, the Legislature reactivated and retitled the Indian early childhood education program (to the "American Indian Early Childhood Education Program"), by Chapter 1183, Statutes of 1989, operative January 1, 1990.
178. Page 6, Sunset Advisory. The introduction continues:

"With regard to each of the programs, the specific statutory and regulatory requirements have been discontinued. Some type of objective evidence of the appropriate use of funds for the 'general purpose' of the particular program *would, however, appear to be necessary.*" (Emphasis added.)

Although the Requester cites this use of "prescriptive language" (page 2, Request), the remaining valid statutes leave no doubt that funding and compliance audit requirements remain undisturbed. The general statement that "some type of objective evidence" might be required is so general that it is unexceptionable. It does not add to or embellish the applicable law.

179. Page 6, Sunset Advisory. The Legislature enacted the Miller-Unruh Basic Reading Act, as it existed in 1987, by Statutes of 1981, Chapter 749, Education Code Sections 54100-54145. This voluntary reading instruction program was to provide funding for reading specialists to prevent and correct reading disabilities, with the highest priority for schools in districts with the greatest need for reading assistance and the fewest resources to obtain it.

Chapter 5, Division 1, Title 5 of the California Code of Regulations (CCR), concerns applications for funds for the Consolidated Categorical Aid programs, including the Miller-Unruh Basic Reading Act, the School Improvement Program, Compensatory Education programs, and the Chacon-Moscone Bilingual-Bicultural Education Act. The introductory sections were adopted in 1978.

Regulations implementing the Miller-Unruh Basic Reading Act appear at Sections 11200-11237, Title 5, CCR, as adopted in 1969. However, in 1981, the Legislature repealed the applicable statutory rulemaking authority provisions, Education Code Sections 54103 and 54161, and enacted Section 54102, giving the Board of Education the authority to adopt rules and regulations to administer the reading program (Chapter 749, Statutes of 1981). To date, the Board has not replaced or adopted regulations under this authority.

180. "Former" Education Code Section 54101.
181. Page 6, Sunset Advisory.
182. Page 7, Sunset Advisory.
183. Page 7, Sunset Advisory. As noted above, Section 62002 preserves "the identification criteria and *allocation formulas* for the program in effect on the date the program shall cease to be operative . . . . "
184. Page 8, Sunset Advisory. Chapter 6, "Improvement of Elementary and Secondary Education" was added by Statutes of 1977, Chapter 894, Education Code Sections 52000 *et seq.* Based on the intent section, which remained unamended at the time the Department issued its Sunset Advisory, the Department summarized the program's general purpose quite aptly:

" . . . the SI program is intended 'to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school.' [final sentence, Section 52000]. These efforts are thus directed to the goal of improving the school's entire curriculum and instructional program for all students. . . . The school site council is required to develop an SI plan and a budget; the plan guides the implementation and evaluation of the school's improvement activities." Page 8, Sunset Advisory.

The school site council's functions and responsibilities still include the school plan, as required by the laws in effect before January 1, 1979.

Sections 4000-4091, Title 5, CCR, adopted in 1978, implement the School Improvement program under the Board's rulemaking authority granted by Education Code Section 52039(b). (Section 4020, Title 5, CCR, notes Education Code Section 53047 as its authority, but we have been unable to find any statutory provision of that number.)

185. Education Code Section 52000.
186. Page 8, Sunset Advisory. Although a few regulations address program review, (e.g. Sections 4070 and 4071, Title 5, CCR), we have not found a reference to the "Program Quality Review Criteria." Since the Department refers to the "standards of quality *contained* in the [ . . . ] Criteria," we conclude that it is a document. As with several other similar references, since we do not have a copy of the document, we have been unable to determine its character as a restatement of other provisions of law or a standard of general application which the Department wishes to apply, with or without adopting it pursuant to the APA.
187. Specifically, Answer 2, on page 8 of the Sunset Advisory, provides:

"The following . . . are no longer in effect:

. . .

"b) The specific requirements of what a school plan must include. [citations omitted]. There continues, however, to be a requirement for a school plan which is designed to meet the students' educational, personal and career needs through the implementation of a high quality instructional program. Improvement efforts in the plan include, but are not limited to, instruction, auxiliary services, school organization and environment. [citation omitted]."

As long as the "school plan" is understood in the most general manner, this section does not impose an unadopted regulatory requirement on the districts, but restates or explains what Section 62002 requires, based on Section 52000, without the specific details of the statutes and regulations made inoperative by the sunset provisions.

188. Education Code Section 64001 provides in part:

"Notwithstanding any other provision of law, school districts shall not be required to submit to the State Department of Education, as part of the consolidated application [for categorical funds], school plans for categorical programs subject to this part. School districts shall assure, in the consolidated application, that the appropriate school plans have been prepared in accordance with law . . . . "

189. Education Code Section 64001 requires school districts to assure, in their consolidated application for categorical funds, that:

" . . . school site councils have developed and approved the school plans for schools participating in the School Improvement Program or School-Based Program Coordination Act . . . . "

190. Page 9, Sunset Advisory.

191. In 1981, the Legislature enacted the School-Based Program Coordination Act to allow schools flexibility to coordinate any categorical funds they receive while ensuring that they continue receiving those funds. See Education Code Sections 52800 through 52903.

192. Education Code Section 52854.

193. For example, Education Code Sections 52850, 52852, 52852.5, and 52853.

194. Paragraph (c) of Answer 6 provides:

"The district must then notify the Consolidated Programs Management Unit of this change in status by submitting Addendum C contained in the Manual of Instruction for the Consolidated Program (Form SDE 100)."

195. Education Code Section 52885 provides in part:

"The State Board of Education shall:

"(a) Adopt rules and regulations necessary to implement the provisions of this chapter [Chapter 12, "School-Based Program Coordination Act"] . . . . "

Section 52886 specifies the responsibilities of the Superintendent of Public Instruction to assist school districts, apportion the funds appropriately, conduct program quality and fiscal reviews and so forth.

196. Page 10, Sunset Advisory. Education Code Section 52854 provides:

"A school site council may request, as part of its school plan, the provision of time during the regular school year to advise students or conduct staff development programs and receive full average daily attendance reimbursement under the provisions of Section 46300. That time shall not exceed eight days each year for each participating staff member."

As the note suggests, since the authorization for staff development time is to be *part* of the school plan, it follows that the statute does not authorize the time in order to *develop* that plan.

197. Page 10, Sunset Advisory.

198. Page 11, Sunset Advisory. The Legislature enacted the Native American Indian Education Program by Chapter 903 of the Statutes of 1977 (Education Code Sections 52060 through 52065). The Program's intent was to:

(1) improve "the educational accomplishments of Native American Indian students in the rural educational systems in California;"

(2) establish projects to improve reading and mathematics competence in prekindergarten through fourth grade; and

(3) involve Native American Indian parents and community members in planning, implementing, and evaluating the programs. Section 52060.

In 1989, the Legislature reinstated the program, renaming it the "American Indian Early Childhood Education Program," by Chapter 1183, Statutes of 1989. This legislation changed the program title, added the word "kindergarten" to the applicable grades ("prekindergarten, kindergarten, and grades 1 to 4, inclusive"), and made other nonsubstantive changes.

199. Education Code Section 62002.5 requires that the provisions regarding parent advisory committees and school site councils which existed as of January 1, 1979 shall apply after the sunset date. Education Code Section 52065 spells out the requirements for the parent advisory group for this program.
200. This program differs from the others in that it has not one but two statutes which stress the importance of parent and community involvement in the program's implementation. The legislative intent and purpose section states expressly:

"The Legislature recognizes the importance of Native American Indian parent-

community involvement in the planning, implementing, and evaluation of such Native American Indian programs." Section 52060, last paragraph, later amended in 1989.

Not only did the Legislature "reactivate" this program, effective 1990; it changed only the title of the program in the paragraph quoted above and deleted the word "Native" from the first clause.

The other relevant provision is Section 52065 which requires both a districtwide advisory committee and a parent advisory group at each participating school. As with Section 52060, the only amendment to Section 52065 was to conform the title to the 1989 legislation.

201. Page 11, Sunset Advisory. These programs, "Educationally Disadvantaged Youth Programs," appear in Chapter 1 of Part 29, "Programs for Disadvantaged Pupils," of Title 2 of the Education Code (Sections 54000 through 54041). Chapter 894, Statutes of 1977, initially added these provisions, and, except for Section 54001 which was amended in 1978, they appeared unchanged in 1987 the Department issued its Advisory. Chapter 82, Statutes of 1989, later amended several of the provisions regarding identification and allocation criteria.

These programs were to provide quality educational opportunities for children disadvantaged by low family income, high transiency rates, non-English-speaking homes, or similar factors which might have an impact on the child's success in school and personal development. The legislation establishing these programs also recognized that federal funds might be available to address some of the same problems, and generally required that the state funds not displace the federal funds.

Section 4200 *et seq.*, Title 5, CCR, contain regulations (adopted in 1979) governing the Economic Impact Aid program, including funding allocation and program requirements for the Bilingual Education (Subchapter 5, beginning at Section 4300) and the State Compensatory Education (Subchapter 6, beginning at Section 4400) programs. The Board of Education has rulemaking authority under Education Code Section 54005.

202. Education Code Sections 54000, 54001, and 54004.3.
203. Page 13, Sunset Advisory. Education Code Section 62002 preserves the funding formulae contained for this program in Sections 54020 through 54028, initially enacted in 1977. Chapter 82, Statutes of 1989, amended Section 54022, simplifying and updating the calculation of the state index of need used to allocate funding.
204. The acronym "ECIA" refers to the federal Education Consolidation and Improvement Act of 1981, Sections 552 *et seq.*, found at 20 U.S.C. (1982 edition) Sections 3801 *et seq.* (Public Law 97-35). The ECIA replaced the earlier Elementary and Secondary Education Act of 1965 ("ESEA"), Sections 101 *et seq.* as amended, 20 U.S.C. 2701 *et seq.* The references to the Acts themselves changed from "Title I" of the ESEA to "Chapter 1" of the ECIA back to "Title I" of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 with the major recodification of 1988.

In 1988, President Reagan signed the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Public Law 100-297). P.L. 100-297 recodified the ECIA and repealed its old provisions at 20 U.S.C. 3801 *et seq.* The 1988 recodification starts at 20 U.S.C. 2701. The Congress has amended these provisions in most succeeding sessions.

205. Chapter 1 of the Education Consolidation and Improvement Act of 1981 ("ECIA") is contained in Sections 552 through 558 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981. These sections revised Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended, by creating block grants and removing detailed programmatic requirements from the categorical funding programs. The ECIA retained requirements necessary for fiscal accountability and specified certain other provisions which would remain in effect. In some ways, the 1981 federal revisions parallel those of the 1987 sunset of the California programs, removing detailed programmatic requirements while retaining intact certain fiscal provisions.

Paragraph (a) on page 13 of the Sunset Advisory states:

"ECIA, Chapter 1, requires that programs in target schools be comparable to those in other schools. When EIA funds are used to meet the educational needs of educationally deprived students and are consistent with the purposes of Chapter 1, districts are allowed to exclude these funds when calculating comparability."

Section 558 of P.L. 97-35, 20 U.S.C. 3807 before its repeal, provided for "Comparability of Services" at subdivision (c):

"(1) A local educational agency may receive funds under this chapter only if State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such districts which are not receiving funds under this chapter. . . . "

Paragraph (b) on page 13 of the Sunset Advisory provides:

"ECIA, Chapter 1, must supplement and not supplant state funded programs. When EIA/SCE programs are consistent with the purposes of Chapter 1, districts may exclude these funds from the requirement that Chapter 1 funds supplement not supplant."

Section 558 of P.L. 97-35, 20 U.S.C. 3807 before its repeal, provided, at subdivision (b):

"Federal Funds to Supplement, Not Supplant Regular Non-Federal Funds.--A local educational agency may use funds received under this chapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-

federal sources for the education of pupils . . . and in no case may such funds be so used as to supplant such funds from such non-Federal sources. . . . "

But Section 558 itself also provided in part:

"(d) Exclusion of Special State and Local Program Funds.--For the purposes of determining compliance with the requirements of subsections (b) and (c), a local educational agency may exclude State and local funds expended for carrying out social programs to meet the educational needs of educationally deprived children, if such programs are consistent with the purposes of this chapter."

206. Paragraph (c), page 13, Sunset Advisory, provides:

"The allocation alternatives (Title 5, sections 4420 and 4421) developed as a result of ESEA, Title I, have been superseded by ECIA, Chapter 1. They are no longer mandated by any statute. However, they may serve as useful guidelines for district [sic] seeking models for the allocation of EIA/SCE funds."

The Department adopted Chapter 6, Articles 1-10 (Sections 4400-4425, not consecutive), entitled "State Compensatory Education Programs" in 1979. Article 6, "Allocation Alternatives," cites Education Code Section 54004 regarding apportionment as an authority. The Legislature repealed this statute in 1985. (As noted above, Congress repealed the ECIA in 1988).

The repeal of the state statutory authority for these regulations rendered them void, even before the sunset provisions might have raised questions about how much of the substance of the regulations survived the sunset.

The Department states that the federal ECIA, Chapter 1, superseded the regulations developed "as a result of ESEA, Title I." The regulations expressly address the interaction of federal Title I and State Compensatory Education funds, so this conclusion may well be correct (although some of the same provisions might have applied, at least in part, to ECIA funds as well). However, because the state statutory authority no longer exists, the regulations themselves have no legal effect or validity.

207. Government Code Section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement *or revision of any such rule, regulation, order or standard* adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . . "

(Emphasis added.)

208. It seems self-evident that the Department is not issuing or trying to enforce a standard of general application, nor is it telling districts to follow any portions of the void regulations.

209. Page 14, Sunset Advisory.
210. Page 14, Sunset Advisory. The Chacon-Moscone Bilingual-Bicultural Act of 1976 (enacted by Statutes 1977, Chapter 36, Education Code Sections 52160 *et seq.*) established a comprehensive program to "offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools, and to provide adequate supplemental financial support to achieve such purpose. Insofar as the individual pupil is concerned, participation in bilingual programs is voluntary on the part of the parent or guardian." Section 52161 as amended as of 1987. The Legislature amended provisions of the Act several times between 1976 and 1987, most notably by the Bilingual Education Improvement and Reform Act of 1980.

One can still find the regulations adopted in 1979 to implement this program at Sections 4300-4320, Title 5, CCR. Education Code Section 52162 grants the Board authority to adopt "such rules and regulations as are necessary for the effective administration of this article ["Article 3, "Bilingual-Bicultural Education Act of 1976," of Chapter 7, "Bilingual Education," Part 28, Division 4, Title 2 of the Education Code]."

211. Education Code Section 52161.
212. 20 U.S.C. Section 1703, subdivision (f), codifying the landmark decision in *Lau v. Nichols* (1974) 414 U.S. 563. The Advisory also reviews subsequent cases interpreting the law regarding language proficiency and education.
213. Page 16, Sunset Advisory.
214. The seven major areas include many more than seven separate statutes however. Footnote 5 of the Sunset Advisory (page 19) phrases the Department's suggestions as suggestions. It also warns that the Commission on Teacher Credentialing believes that existing credentialing requirements may be in effect under certain circumstances. The Department takes no position, but also advises that the Commission plans to issue "coded correspondence" shortly. This "coded correspondence" may, like much of the Sunset Advisory, simply restate which laws are still in effect with respect to required bilingual certificates and authorizations, or it may contain "underground regulation" portions, depending on what the Commission has done. Any OAL determination on these points would have been beyond the scope of this Determination.
215. Page 19, Sunset Advisory.
216. Education Code Sections 52164, 52164.1, and 52164.2 govern the "census of pupils of limited English proficiency." This identification criterion clearly controls bilingual funding. See also Section 52168. The statutory provisions are fairly detailed. Whether anything else related to the procedures or forms used in the "R-30 annual census" might be regulatory is beyond the scope of this determination. Nothing in the Sunset Advisory would change the nature of the process already in place, whether it is regulatory or "administrative." Section 52164.1 provides that

"The superintendent, with the approval of the State Board of Education, shall prescribe census-taking methods, applicable to all school districts in the state,

which shall include, but need not be limited to, the following: . . . . "

Other provisions refer to "rules and regulations adopted by the board." (Paragraph 7, page 14, Sunset Advisory). No party has provided us with the Department's materials governing the entire census procedure, including the instrument mentioned in paragraph 6 of subdivision (c), Education Code Section 52164.1:

"The Department of Education shall annually evaluate the adequacy of and designate the instruments to be used by school districts . . . . "

Without the relevant materials, OAL cannot determine whether the statute plus Department regulations govern the entire procedure or whether there are additional unadopted requirements.

217. Page 20, Sunset Advisory.

218. Item (c) on page 21 states:

"*Classroom Composition*. Alternatives to the strict classroom composition ratios of LEP and non-LEP students are now available. Districts are cautioned, however, to avoid approaches which promote prohibited segregation of LEP students [footnote omitted]."

The last paragraph states:

"It must be remembered that each of the eight general purposes of former Section 52161 must be integrated into the entire bilingual education program."

This statement adds nothing beyond the requirements of Section 62002 and 52161.

219. We use the terms "exemption" and "exception" interchangeably.

220. Given this conclusion, there is no need to decide whether or not the Department has properly complied with the procedures mandated by section 33308.5. This is an issue for the courts, not for OAL, to decide.

221. In 1947, that provision was numbered Government Code Section 11420.

222. The *Engelmann* Court, speaking to the agency involved in the determination under consideration, cites this provision emphatically:

"The statute [former Government Code Section 11420, 'the identical predecessor to 11346'] expressly states, 'the provisions of this article are applicable to the exercise of *any* quasi-legislative power conferred by *any* statute *heretofore or hereafter* enacted, but nothing in this article repeals or diminishes any additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by *any subsequent* legislation except to the extent that such legislation shall do so *expressly*.' (Gov.Code, § 11346 [emphasis supplied (by Court)].)" (2 Cal.App.4th at 59; 3 Cal.Rptr.2d at 272).

223. *Lè Ballister v. Redwood Theatres, Inc.* 1 Cal.App.2d 447, 448 (1934); *R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 135.
224. *Ganyo v. Municipal Court* (1978) 80 Cal.App.3d 522, 529; and see Black's Law Dictionary (5th ed., 1979, p. 521).
225. *Addison v. Holly Hill Fruit Products* (1944) 322 U.S. 607, 618.
226. *SWRCB v. OAL*, supra, 12 Cal.App.4th 697, 703.
227. *Id.* Other examples of express exemption provisions include:
  - "[t]he determination of the facility fee pursuant to this section . . . is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 2 of Title 2 of the Government Code [the rulemaking portion of the APA]." (Emphasis added; Health and Safety Code Section 25205.4, subdivision [b].)
  - "Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 2 of Title 2 of the Government Code, any emergency regulation adopted by the board pursuant to this section shall be filed with, but not repealed by, the Office of Administrative Law, and shall remain in effect until revised by the board." (Emphasis added; Health and Safety Code Section 25299.77.)

Furthermore, in several cases the Legislature has made specific references to governmental entities to which the APA does not apply. For example, Government Code Section 11351 specifically provides that the APA's procedures for adopting regulations "shall not apply" to the Public Utilities Commission, the Industrial Accident Commission, the Workers' Compensation Appeals Board, and the Division of Industrial Accidents, although those agencies' rules of procedure must still be published in the California Code of Regulations.

Another variation is when certain types of rules enacted by an agency are exempted from the APA, but other types are not. One example is found in Public Resources Code Section 30333 [Coastal Commission rules and regulations generally required to be adopted pursuant to the APA, but "guidelines", adopted pursuant to Public Resources Code Section 30620, subdivision (a), are expressly exempt, according to *Pacific Legal Foundation v. California Coastal Comm'n.* (1982) 33 Cal.3d 158, 169 n. 4; *California Coastal Comm'n v. Office of Admin. Law* (1989) 210 Cal.App.3d 758.]

228. 2 Cal.App.4th 47, 59, 3 Cal.Rptr. 2d 264, 272.
229. p. 979.
230. See note 40.
231. *Faunce v. Denton* (1985) 167 Cal.App.3d 191, 197, 213 Cal.Rptr. 122, 125 (following *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135-36).

232. (State Personnel Board and Department of Food and Agriculture), California Administrative Notice Register 86, No. 41-Z, October 10, 1986, B-14.
233. In the ancient Near East, special provision was made for persons who had committed what in modern times we might refer to as involuntary manslaughter. Special cities of refuge were provided to which the killer could flee; once the killer reached the city of refuge, relatives of the victim were relieved of their duty to avenge the death:
- "It is in the following case that a homicide may take refuge in such a place to save his life: when someone unwittingly kills his neighbor to whom he had previously borne no malice. *For example*, if he goes with his neighbor to a forest to cut wood, and as he swings his ax to fell a tree, its head flies off the handle and hits his neighbor a mortal blow, he may take refuge in one of these cities to save his life." (Book of Deuteronomy, 19: 4-5, New American Bible (1970); emphasis added.)
234. Examples may be found in duly adopted regulations. See, e.g., title 1, CCR, section 46.
235. Department of Personnel Administration, "Benefit News," November, 1994.
236. 223 Cal.App.3d 490, 501-502, 272 Cal.Rptr. 886, 891-892.
237. 272 Cal.Rptr. at 891; emphasis added.
238. One could also seek authoritative judicial interpretation of the statute.
239. For instance, the Legislature requires agencies to assess job impact as part of the rulemaking process. (Government Code section 11346.54.) Thus, a policy "clarification" that had a positive impact on job creation would be preferred to one with a negative impact, all else being equal. At a minimum, rulemaking agencies are expected to assess job impact as a part of weighing the costs and benefits of various alternative ways of implementing statutes.
240. Government Code Section 11346.
241. *Armistead* disapproved *Poschman* on other grounds. (*Armistead*, *supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1.)
242. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
243. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130, 135.
244. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130, 136.
245. A good discussion of a forms issue may be found in **1993 OAL Determination No.5** (State Personnel Board and Department of Justice), California Regulatory Notice Register 94, No. 2-Z, January 14, 1994, pp. 105-106; typewritten version, pp. 265-267.

- 246. Declaration of John L. Bukey, Attachment B to Agency Response, p .1; emphasis added.
- 247. 149 Cal.App.3d 1124, 197 Cal.Rptr. 294.
- 248. In *National Elevator Services, Inc. v. Department of Industrial Relations* (1982) 136 Cal.App.3d 131, 143, 186 Cal.Rptr. 165, 172, the California Court of Appeal held that the Division of Occupational Safety of Health had "improperly attempted to exercise the quasi-legislative function reserved to the [Occupational Safety and Health Board]." The Court declined to defer to an administrative interpretation contained in an opinion of counsel because the statutory interpretation occurred in "an internal memorandum, rather than in an administrative regulation which might be subject to the notice and hearing requirements of proper administrative procedure."